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NAVAL POSTGRADUATE SCHOOL

MONTEREY, CALIFORNIA

THESIS

LAW ON THE ROCKS: INTERNATIONAL LAW AND CHINA'S MARITIME DISPUTES

by

Jason S. Nakata

December 2014

Thesis Advisor:	Anne L. Clunan
Second Reader:	Michael Glosny

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Maritime disputes in the Western Pacific have increased tensions among East Asian states. This thesis uses three case studies to investigate two questions: first, whether China's maritime claims and behavior align with international legal principles governing maritime disputes, and second, which IR framework best describes China's behavior related to its maritime disputes. The first case study examined ten legal rulings on maritime sovereignty and concludes that courts view effective control as a determinative factor in settling maritime disputes. The second case study examined effective control in three of China's maritime disputes. The analysis revealed Japan's claim to the Senkaku Islands and China's claim to the Paracel Islands are strong due to continued demonstrations of effective control. However, the Philippine claim to the Scarborough Shoal using effective control is valid but weak. The final case study showed how China attempts to effective control on its maritime claims using legal warfare. Based on the analysis of Chinese legal warfare, evidence shows two IR frameworks best describe China's behavior related to its maritime claims. Legal warfare provides a façade for offensive realist behavior; whereas the English School of realism expects China to use legal warfare to conform to some norms while revising other norms.

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LAW ON THE ROCKS: INTERNATIONAL LAW AND CHINA'S MARITIME DISPUTES

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Submitted in partial fulfillment of the
requirements for the degree of

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Maritime disputes in the Western Pacific have increased tensions among East Asian states. This thesis uses three case studies to investigate two questions: first, whether China's maritime claims and behavior align with international legal principles governing maritime disputes, and second, which IR framework best describes China's behavior related to its maritime disputes. The first case study examined ten legal rulings on maritime sovereignty and concludes that courts view effective control as a determinative factor in settling maritime disputes. The second case study examined effective control in three of China's maritime disputes. The analysis revealed Japan's claim to the Senkaku Islands and China's claim to the Paracel Islands are strong due to continued demonstrations of effective control. However, the Philippine claim to the Scarborough Shoal using effective control is valid but weak. The final case study showed how China attempts to effective control on its maritime claims using legal warfare. Based on the analysis of Chinese legal warfare, evidence shows two IR frameworks best describe China's behavior related to its maritime claims. Legal warfare provides a façade for offensive realist behavior; whereas the English School of realism expects China to use legal warfare to conform to some norms while revising other norms.

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LIST OF ACRONYMS AND ABBREVIATIONS

ADIZ	air defense identification zone
ASEAN	Association of Southeast Asian Nations
CCG	Chinese Coast Guard
CCP	Chinese Communist Part
DEA	Drug Enforcement Administration
ECAFE	UN Economic Commission for Asia and the Far East
EEZ	Exclusive Economic Zone
ICJ	International Court of Justice
ITLOS	International Tribunal for the Law of the Sea
IR	international relations
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PLA	People's Liberation Army
PLAAF	People's Liberation Army Air Force
PLAN	People's Liberation Army Navy
PLANAF	People's Liberation Army Navy Air Force
PRC	People's Republic of China
ROC	Republic of China
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNSC	United Nations Security Council
WTO	World Trade Organization

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I. INTRODUCTION: CHINA'S MARITIME CLAIMS AND INTERNATIONAL LAW

A. MAJOR RESEARCH QUESTION

Since 2009, maritime disputes in the Western Pacific have increased tensions among Asian neighbors. At the center of these maritime disputes is the People's Republic of China. China contests the Senkaku Islands with Japan, the Paracel Islands with Vietnam, Huangyan Island (commonly referred to as Scarborough Shoal) with the Philippines, and the Spratly Islands with Vietnam, Philippines, Malaysia, Brunei, and Taiwan. These territorial disputes brew nationalism, create diplomatic tension, and can incite more armed conflict. Can China's maritime territorial disputes reveal its intent to rise as a revisionist or status quo power?

This thesis will investigate whether China's claims and behavior align with international legal principles governing maritime disputes. The central research questions are the following: Do China's maritime claims and behavior regarding the Senkaku Islands, Paracel Islands, and Scarborough Shoal have a sound basis in contemporary international law? Are international legal principles likely to constrain China's current and future behavior in these disputes? More generally, does China comply with international law and the peaceful settlement of disputes banning territorial conquest that have characterized the international order since 1945?

In order to answer these questions, the thesis will examine the legal principles that appear to be decisive in contemporary maritime settlements that are applicable to the China cases, as well as the arguments made in the Chinese maritime disputes. Recent international maritime legal decisions are germane to these disputes, and may indicate whether China is likely to legally win its cause, and consequently, whether China will rely on peaceful legal remedies or more forceful means. The thesis will ultimately assess to what degree international law shapes China's behavior in these maritime disputes.

The thesis will use three case studies to show China's behavior related to its maritime disputes conforms to two IR frameworks. The first case study will analyze ten

international court verdicts on maritime disputes. The case study will conclude effective control is the most determinative factor in deciding sovereignty for islands and rocks. The second case study will analyze demonstrations of effective control in three Chinese maritime disputes. Analysis will reveal Japan's claim to the Senkaku Islands and China's claim to the Paracel Islands is relatively strong due to clear demonstrations of effective control. However, analysis of the Scarborough Shoal dispute will argue the Philippines conducted weak but valid demonstrations of effective control. The third case study will analyze how China's strategy of legal warfare attempts to exert effective control over its maritime disputes. China's use of legal warfare provides evidence for which IR theory best describes its behavior related to PRC maritime disputes. The English School of Realism is the strongest IR framework that describes Chinese behavior because it conforms to some international norms and laws while attempting to revise the internationally accepted standard of how sovereignty is determined. Offensive realism is another IR framework that describes China's behavior because it acts in an irredentist manner while using legal warfare to disguise the PRC's true expansionist intent. Defensive realism and liberal institutionalism do not adequately explain Chinese behavior related to its maritime disputes.

B. SIGNIFICANCE OF THE RESEARCH QUESTION

An analysis of international law pertaining to China's maritime claims has become increasingly relevant as it grows more powerful. China's maritime claims in the East and South China Seas have run afoul of its maritime neighbors. Japan currently controls the Senkaku Islands that China claims were part of Imperial China. Recent saber-rattling on both sides have escalated already strained relations and could draw the United States into a conflict through the United States-Japanese security alliance, or through destabilization of the region.[1]

[1] Reinhard Drifte, "The Senkaku/Diaoyu Islands Territorial Dispute Between Japan and China: Between the Materialization of the 'China Threat' and Japan 'Reversing the Outcome of World War II'?" *UNISCI Discussion Papers* 32 (May 2013): 9–60, (hereafter cited as "The Senkaku/Diaoyu Islands Territorial Dispute"); Mira Rapp-Hooper, "The Battle for the Senkakus Moves to the Skies," *The Diplomat*, November 12, 2013, http://thediplomat.com/2013/11/the-battle-for-the-senkakus-moves-to-the-skies/.

The Philippines dispute China's claim to Scarborough Shoal and the Spratly Islands. Since 2012, Chinese law enforcement vessels prohibited Philippine fishermen from fishing around Scarborough Shoal, even though the shoal is within the Philippines' 200 nautical mile exclusive economic zone (EEZ). Despite the withdrawal of the Philippines naval vessel, *Gregorio del Pilar*, Chinese law enforcement vessels remain on patrol by the shoal. Similar to the Senkaku case, a conflict between China and the Philippines could potentially draw the United States into a war against China. Based on China's encroachment into Scarborough Shoal, the Philippines submitted the maritime dispute to arbitration in 2013. A verdict in favor of the Philippines could inspire other claimant states to pursue legal remedies as well.[2]

Vietnam disputes China's claim to the Paracel and Spratly Islands. In 1988, China's People's Liberation Army Navy (PLAN) gunned down 60 Vietnamese soldiers who were planting a flag on Johnson Reef, Spratly Islands. Since 1999, Vietnam has protested an annual Chinese fishing ban within both countries' disputed exclusive economic zone. The recent exploratory drilling of the Chinese oil rig *HD-981* within Vietnam's claimed EEZ sparked a low intensity military conflict that later ignited violent anti-Chinese demonstrations in Vietnam. It is apparent the East and South China Seas have become a flashpoint in Asia.[3]

China has a multitude of reasons to defend its claims. First, an international court may interpret China's inaction as acquiescence. China cannot yield to foreign incursions as claimant states could use the PRC's failure to act as a demonstration of acquiescence in an international court and rule in the claimant's favor. Second, defending Chinese sovereign territory is a vital national interest. In China's White Paper on Peaceful

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[2] Renato Cruz De Castro, *China's Realpolitik Approach in the South China Sea Dispute: The Case of the 2012 Scarborough Shoal Standoff*, Managing Tensions in the South China Sea (Washington, DC: Center for Strategic & International Studies, 2013), http://csis.org/files/attachments/130606_DeCastro_ConferencePaper.pdf, (hereafter cited as *China's Realpolitik Approach in the SCS*); Jeff Himmelman, "A Game of Shark and Minnow," *The New York Times Magazine*, October 27, 2013, http://www.nytimes.com/newsgraphics/2013/10/27/south-china-sea/; Luke Hunt, "China's Un-Neighborly Fishing Ban," *The Diplomat*, May 19, 2012, http://thediplomat.com/2012/05/chinas-un-neighborly-fishing-ban/, (hereafter cited as "Fishing Ban").

[3] Hiep, Le Hong, "Vietnam's Domestic-Foreign Policy Nexus: Doi Moi, Foreign Policy Reform, and Sino-Vietnamese Normalization," *Asian Politics and Policy* 5, no. 3 (2013): 398; Hunt, "Fishing Ban."

Development, core interests include "state sovereignty" and "territorial integrity."[4] China must uphold the precedent of defending what it perceives as national territory. Failure to defend what China perceives as national territory inspires maritime claimants to take more territory. Additionally, separatists in Xinjiang, Tibet, or Taiwan could declare independence if China did not defend its borders. Maintaining Chinese territorial integrity is not only a core interest, but vital for regime legitimacy. If the Chinese Communist Party is incapable of defending a core interest, the regime may find itself combating civil unrest to maintain its own survival. Third, defense of Chinese economic growth is a vital national interest. The exclusive economic zone attached to the maritime claims entitles China to food, mineral, and energy resources for its economy. Finally, nationalism affects the Chinese Communist Party's (CCP) legitimacy. Failure to defend maritime claims (particularly against Japan) would cast the CCP in a vulnerable and weak light. Therefore China perceives the maritime territorial disputes as vital national interests, a failure to defend these national interests would negatively affect the CCP's legitimacy.

C. LITERATURE REVIEW

In answering the research questions, this thesis will examine the relationship between China and international law. China's adherence (or enmity) to international law can provide indicators as to whether its rise will be as a peaceful or expansionist power. First, it will review the relevance of international law in IR theory. Second, it will analyze China's behavior in the context of IR theories. This section will use realism, the English School of Realism, and liberalism, as a framework to discuss China's behavior.

1. International Law and International Relations Theory

There is a debate within international relations theory as to whether international law has any effect on the way states, including China, behave. Some international relations scholars, like realists, argue international law is irrelevant. Other IR scholars, like liberals, claim that international law constrains the behavior of states. This section

[4] People's Republic of China, "White Paper: China's Peaceful Development" (Information Office of the State Council, September 2011), http://english.gov.cn/official/2011-09/06/content_1941354.htm.

will summarize three schools of international relations theory and their views on international law.

Realists, such as Hans Morgenthau, dismiss the role of international law, arguing that the underlying influence in international relations is the lack of central authority; in such a situation of anarchy, power is what drives states, as it alone can ensure their survival and security. Reliance on international law to maintain peace and stability is idealistic because it ignores the reality of power. Determined states will ignore the constraints of international law and act to promote their narrow self-interest. Richard Steinberg summarizes this view as, "the strong do what they may, and the weak do what they must."[5] For example, Stalin and the Soviet Union placed great faith in the Molotov-Ribbentrop Pact of 1939. In 1941, the Soviet Union paid dearly for Stalin's faith in this agreement as the Soviets gave ground to the Nazi blitzkrieg advance. Realists like Stephen Krasner further argue international law was an "epiphenomenon" of power, as it is a tool used by powerful states against weaker states.[6] Because the great powers create international institutions, those institutions do the bidding of the great powers.[7] Major power, in this view, are expected to ignore or break international laws when they conflict with their immediate interests.

Realists believe international law and institutions are propped up by powerful countries to control weaker countries. If power shifts away from the countries that promote international institutions, then those institutions should disappear. This view was undercut when, even as power diffused from stronger countries to weaker countries, the institutions that the powerful had created remained. As power shifted over time from the post-war years to the 1980s, the United States increasingly shared power with European states in organizations like the General Agreement on Tariffs and Trade and the

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[5] Richard H. Steinberg and Jonathan M. Zasloff, "Power and International Law," *The American Journal of International Law* 100, no. 1 (January 2006): 73 (hereafter cited as "Power and International Law").

[6] Ibid., 74–75.

[7] Ibid., 72–76; Christian Reus-Smit, "The Politics of International Law," in *The Politics of International Law* (Cambridge: Cambridge University Press, 2004), 16–17 (hereafter cited as "The Politics of International Law").

International Monetary Fund.[8] Realism, therefore, fails to explain even a modest adherence of major powers to international law and customary norms.

In contrast, Hedley Bull and the English School of realism bring together some of the insights of classical realism and liberalism. They argue that, despite the anarchy of international relations, an international society emerges among states with common rules, beliefs, and interests. Bull cites the work of Hugo Grotius in arguing that, "States are not engaged in simple struggle, like gladiators in an arena, but are limited in their conflicts with one another by common rules and institutions."[9] Although power is influential, it fails to predict a state's behavior.

Bull argues that states adhere to three types of norms that uphold the international order. First, because states have common goal in insuring that only states can act at the international level, they form a "society of states," with the purpose of preventing one state from eradicating other states from the system. This contrasts with the constant world of warfare among states described by Thomas Hobbes. Second, within the "society of states," rules for coexistence keep states acting together in support of the society. These rules establish how states interact with each other and consist of the respect for state sovereignty, the principle that promises should be kept, and the idea violence should be limited.[10] The first rule of coexistence consists of the idea that each state has the right to own and govern particular pieces of territory. This basic rule of the existence of sovereign property rights underpins international stability, according to the English School. The second rule of coexistence is the idea that states can enter into agreements with each other with the expectation that their promises will be kept and reciprocated. The third rule restricts the use of warfare to moments that are justified. Finally, states develop complex rules designed to foster and regulate cooperation within the "society of states." These rules pursue secondary goals like social welfare or economic gain.[11] States

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[8] Steinberg and Zasloff, "Power and International Law," 79.

[9] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd ed. (London: Macmillan, 1977), 25, (hereafter cited as *The Anarchical Society*).

[10] Ibid., 40.

[11] Ibid., 64–67.

uphold the rules of society through the institutions of international law, diplomacy, the balance of power, and when necessary, war.

Although the "society of states" is held together with rules and norms, individual states can attempt to alter those rules and norms. Because of the anarchic international system, no global authority enforces rules and norms upon states. Therefore, the states themselves must legitimize and enforce rules. Rule legitimization and enforcement occur through international institutions like the United Nations or World Trade Organization. States, in a demonstration of self-help, can attempt to change the rules from within the "society of states."[12] "States change the old rules by violating or ignoring them systematically enough to demonstrate that they have withdrawn their consent to them."[13] However, violation of the basic rules of coexistence, in particular territorial sovereignty, are unlikely to be accepted, as changing them undermines the existence of the society of states as a whole. Violation of property rights is likely to lead to an armed response from a coalition of states acting against the transgressor, as was the case in the 1991 war against Iraq to restore Kuwaiti sovereignty.

The liberal tradition of international relations theory shares with the English School of realism an acceptance of the self-interested origins and maintenance of international law. It downplays the English School's emphasis on the role of mutual interest in a society of states as the galvanizing rationale for international institutions. Robert Keohane, one of the founders of neoliberalism, argues that the pessimistic realist view on institutions (including international law) is incorrect. Keohane finds that repeated self-interested interaction among states yields cooperation to create and uphold international institutions, including international laws. These institutions allow for information sharing, transparency, wider bases for cooperation, and reduced uncertainty with respect to intentions.[14] Liberals argue the existence of institutions promotes international stability and provides an incentive to conform to established norms and laws

[12] Ibid., 69–71.

[13] Ibid., 70.

[14] Ibid., 79. It should be noted that although Keohane avoids specifically mentioning international law as an institution it is inherently implied.

for the benefit of mutual long-term absolute economic and security gains. In addition to absolute gains, states will conform to rules and norms, like international law, because of their expectation of reciprocity.[15] In contrast to the realist view, neoliberals argue that both powerful and weak states have incentives to abide by international law even when the laws may conflict with their short-term interests, so long as they expect their long-term benefits from conforming to the law outweigh their short-term gains from violating it.

In summary, hypotheses on the effect of international law on international relations vary widely from realism, the English School of Realism, and liberalism. Realism dismisses the effect of international law, as powerful states will do what they will regardless of the constraints imposed by liberal institutions. The English School of Realism builds a case that a "society of states" with common norms and values exist. This society creates an environment for common norms, like international law, to be successful. Due to anarchy, states reserve the right to conform, change, or defect from established international norms; however, they are least likely to challenge the basic rules of coexistence, including respect for sovereignty and limitation of violence. Liberalism argues cooperation is possible through repeated self-interested interaction and institutions. International law is an institution that constrains behavior in favor of international stability and reciprocity. With this baseline understanding of how international law effects international relations, the discussion will turn to how IR theorists view China's rise.

2. China's Rise in International Relations Theory

As China rises, international relations scholars debate whether it does so peacefully or belligerently. China's adherence and respect for international law is an indicator as to the nature of a peaceful rise. Conversely, China's ambivalence toward international law could indicate an expansionist inclination. Before discussing China's

[15] Ibid., 79–82; Aaron Friedberg, "The Future of U.S.-China Relations: Is Conflict Inevitable?," *International Security* 30, no. 2 (Fall 2005): 13–14, (hereafter cited as "Future of U.S.-China Relations"); Reus-Smit, "The Politics of International Law," 18–20.

relationship with international law, it is relevant to discuss the general nature of China's rise in the IR literature.

3. Realism

There are many flavors of realist theories; this section will examine defensive realism, offensive realism, and the English School of Realism.

a. Defensive Realism

Among realists, defensive realists suggest China can rise peacefully if it conveys its defensive intent to neighboring states and major powers. Defensive realism argues that security, not power, is the primary pursuit of states in an anarchical system. States accumulate security through militarization or by bandwagoning with strong states. States also act conservatively to prevent a misinterpretation of intent. States attempt to avoid inadvertent security competition or counterbalancing against itself by rival states. Theodore Roosevelt's saying, "Speak softly but carry a big stick," is a simplistic embodiment of defensive realism.[16]

While rising, China's military modernization should avoid initiating a security dilemma among its neighbors, in the defensive realist view. China can build a strong military, centering on defense, to deter aggression and defend territorial sovereignty.[17] Such a defensive buildup might be evident in China's strong navy built around a weak underway-replenishment capability.[18] Similarly, China's air force is modernizing with limited aerial refueling capability.[19] Additionally, China lacks strategically located logistical bases throughout the region or around the world. All three examples imply the People's Liberation Army intends to operate close to home as opposed to project power far from its shores. The Chinese defensive realist reserves the capability to defend against

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[16] Theodore Roosevelt, "Letter from Theodore Roosevelt to Henry Sprague," January 26, 1900, Library of Congress, http://www.loc.gov/exhibits/treasures/trm139.html.

[17] David Shambaugh, "Coping with a Conflicted China," *Washington Quarterly* (Winter 2011): 12, (hereafter cited as "Conflicted China").

[18] Bernard D. Cole, *The Great Wall at Sea: China's Navy in the Twenty-First Century*, Second (Annapolis, MD: Naval Institute Press, 2010), 72–76, 95, 107–108.

[19] Ibid., 109, 154.

aggression by the United States in the form of nuclear weapons, DF-21D anti-ship ballistic missiles, and anti-satellite missile capability.[20]

In the context of the Senkaku Islands, Paracel Islands, and Scarborough Shoal, a defensive realist argument would identify the islands as a vital national interest tied to the survival of the country. The islands are strategically important and valuable in natural resources. Strategically, the disputed maritime claims represent a defensive perimeter or a naval buffer. The islands are geographically located between U.S. security allies, close to the Strait of Malacca, and located along the major sea line of communication connecting Chinese ports to Europe and the Middle East. Therefore, the islands represent a defensive perimeter worthy of protection, that also happens to have historic meaning to China. Concurrently, China's behavior must prevent aggravating its maritime neighbors so they do not engage in counter balancing or security dilemmas.

b. Offensive Realism

IR theorists like John Mearshimer counter the defensive realist argument in three ways. First, despite government declarations on China's peaceful rise (as seen in the statements of peaceful rise above), Mearsheimer suggests that states can never truly know about another state's intentions. Therefore states can never confidently know that a state's intentions are purely defensive. Second, as a country builds up its military under the auspices of defense, these weapon systems can be used for both offense and defense. An aircraft carrier, such as the newly launched *Liaoning*, can be used for both defense (to defend maritime sovereignty) and offensive power projection (similar to U.S. employment of aircraft carriers). A stealth fighter like the *J-20* can be used for air defense, or offensive strikes similar to U.S. employment of the *B-2* bomber.[21] Third, China's historical, non-aggressive behavior toward its neighbors is not a reliable indicator

[20] Amy Chang, *Indigenous Weapons Development in China's Military Modernization*, U.S.-China Economic and Security Review Commission Staff Research Project (U.S.-China Economic and Security Review Commission, April 5, 2012), 14–20.

[21] John J. Mearsheimer, "The Gathering Storm: China's Challenge to U.S. Power in Asia," *The Chinese Journal of International Politics* 3 (2010): 387–390, (hereafter cited as "The Gathering Storm"); Johnston, Alastair Iain, "Is China a Status Quo Power?" *International Security* 27, no. 4 (Spring 2003): 25–26.

to China's future behavior. Foreign and domestic conditions can force a country to react to a situation differently than it has in the past. Because a state cannot truly know another state's intentions, states are forced to assume the worst, leading to a security dilemma. Inevitably, states cannot be secure unless other states are insecure.[22]

An offensive realist may view China's actions vis-à-vis the maritime disputes as expansionist. Yet, Mearshimer argues an alternative point by contending that states are most likely to expand their power relative to another state when they already have a power advantage over it. Until the balance of power shifts in its favor, states must accumulate power.[23] For example, China's military modernization provided the People's Liberation Army with state-of-the-art ships and aircraft. These weapons gave China a clear military power advantage over weaker militaries from Vietnam and the Philippines. This modernized capability also deters the United States and Japan from attacking China. China utilizes its maritime superiority and economic power to bully Vietnam and the Philippines. Evidence of China's use of maritime power is demonstrated by increased Chinese naval patrols in the vicinity of the Paracel Islands and Scarborough Shoal. The overwhelming Chinese naval superiority deterred Vietnam and the Philippines from escalating maritime disputes into military conflict. Chinese economic power was used to sanction Philippine assertiveness in the vicinity of the Scarborough Shoal when 1,200 containers of fruit were held in quarantine at various Chinese ports. The sanctions hurt the Philippines, which exports 30% of its bananas to China.[24] China's economic power also deterred Vietnamese military escalation. Vietnam's trade deficit with China was between $17.4 billion and $23.4 billion and Vietnam could not afford Chinese economic isolation.[25]

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[22] Mearsheimer, "The Gathering Storm," 382–384.

[23] John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: W.W. Norton and Company, Inc., 2014), 360–383.

[24] Shambaugh, "Conflicted China," 12–13; Bonnie S. Glaser, "China's Coercive Economic Diplomacy," *The Diplomat*, July 25, 2012, http://thediplomat.com/2012/07/chinas-coercive-economic-diplomacy/; Cruz De Castro, *China's Realpolitik Approach in the SCS*.

[25] Asia Briefing, "Vietnam Addresses Trade Deficit with China," *Asia Briefing*, August 6, 2013, http://www.asiabriefing.com/news/2013/08/vietnam-addresses-trade-deficit-with-china/; Xinhua, "China Remains Vietnam's Biggest Trade Partner in 2013," *China Daily*, January 29, 2014, http://www.chinadaily.com.cn/business/chinadata/2014-01/29/content_17264283.htm.

In both offensive and defensive realism, even if China pursues a defensive arms buildup, strategic misinterpretation can lead to security competition or armed conflict.[26] What may actually be defensive behavior is perceived as expansionist. Neither branch of realism expects international legal norms or institutions to prevent or constrain Chinese behavior. The basic premise for both schools is that states will act in accordance with institutions (like international law) when it suits them. Realists are fundamentally motivated to use power for self-help. If an institution's goals conform to the state's self-help objectives, the state will support institutionalized behavior. However, if an institution and a state's self-help goals are in conflict, the realists will opt out of institutionalized behavior.

4. English School of Realism

In contrast to the American-dominated schools of offensive and defensive realism, the English School of realism argues that states, while pursuing their power and security interests, share common goals of ensuring the continuing existence of states as the dominant actors in world politics. In order to prevent the emergence of an actor powerful enough to eradicate all states and form a sort of global empire, states will cooperate to a limited extent in creating a basic set of international rules and institutions to preserve the state system. These rules include adherence to the principle of the balance of power (to prevent hegemony) as well as international laws regarding sovereignty and territorial integrity that prevent the eradication of a state from the international system, among others. As such, English School realists view the international system as a society of states.[27]

Barry Buzan argues that China participates in some aspects of contemporary international society, yet in other aspects it does not. He suggests that China is a rule abider in three ways. First, China had to adopt norms and practices in order to participate in the globalized economy. It must abide by norms set forth in international economic organizations like the World Trade Organization (WTO). Second, China subscribes to

[26] Ibid., 384–385.

[27] Bull, *The Anarchical Society*.

standards of international society. For example, China holds conservative views of sovereignty and non-intervention as evident in its Five Principles of Peaceful Coexistence and reluctance to interfere in other states internal matters. Third, China makes contributions to UN peacekeeping and non-proliferation. The People's Liberation Army provides more forces to UN peacekeeping operations than the United States or United Kingdom combined.[28] It has signed international agreements like the Non-Proliferation Treaty and the Chemical Weapons Convention.[29]

However, according to Buzan, China is outside the norm of international society in three ways. First, China is a non-democracy in a "Western dominated political order."[30] Second, China votes in the UN Security Council to defend its domestic self-interests (more on this below under liberal institutionalism). Third, China's Sino-centric historic waters view of its maritime disputes comes into conflict with Westphalian norms. As will be discussed in later chapters, although China is a signatory of the United Nations Convention on the Law of the Sea (UNCLOS), its adherence to the Qing era, Sino-centric paradigm of legal rights leads China to argue that customary international law justifies its claim to maritime disputes in East Asia. In this paradigm, China was the dominant power in East Asia and other barbaric kingdoms throughout the region recognized this power and paid tribute to the Middle Kingdom. Therefore the Sino-centric norm pre-dated UNCLOS by hundreds of years and, in the Chinese view, remains relevant today. This will be explained in greater detail in Chapter III.

In the end, Buzan concludes China can either adhere to international norms or rewrite the norms, but it is up to China. Based on observed Chinese behavior, Buzan classifies China as a reformist revisionist, which he defines as, "accepting some of the institutions of international society for a mixture of calculated and instrumental reasons.

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[28] United Nations, "UN Peacekeeping Troop and Police Contributors," *United Nations*, June 2014, http://www.un.org/en/peacekeeping/resources/statistics/contributors.shtml.

[29] Barry Buzan, "China in International Society: Is 'Peaceful Rise' Possible?" *The Chinese Journal of International Politics* 3 (2010): 9-16, (hereafter cited as "China in International Society").

[30] Ibid., 14.

But it resists and wants to reform, others, and possibly also wants to change its status."[31] Therefore, China conforms to or disregards international societal rules when it sees fit.[32]

Realisms of all stripes lacks clarity concerning China's expansionist behavior or its compliance with international law, with the English School being the most optimistic, and offensive realism being most pessimistic. In contrast, liberals argue that all states have interests in creating and upholding international laws and institutions, as these provide mutual, long-term benefits that out-weigh short term costs of noncompliance.

5. Liberalism

From an optimistic liberal perspective China can rise peacefully. In liberalism, domestic factors shape foreign policy actions. Richard Rosecrance offers an optimistic liberal point of view stating China will rise peacefully because economic growth is more important than conflict. There is no longer a requirement to take resources by conquest. Through globalization, countries can obtain resources through trade. Furthermore, globalization provides an incentive for countries to act within norms. Due to the interdependent nature of the globalized economy, conflict would cripple China's economic growth. Economic powers (including the United States and Japan) would trade elsewhere, pricing China's potential loss of trade in the trillions of dollars. China would lose foreign direct investment from economic powers like the United States, Japan, the European Union, and even Taiwan. Therefore, conflict would disrupt the economic growth that China has sustained since the 1980s (See Table 1). Inability to sustain economic growth could delegitimize the regime, negatively affecting the Chinese Communist Party's mandate to rule. Additionally, China could stand to lose from punitive sanctions levied by economic powers to punish or dissuade aggressive Chinese behavior. Similar to the sanctions levied by the United States and European Union against Russia in 2014, China could be subject to the same economic treatment if it engaged in conflict.[33]

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[31] Ibid., 18.

[32] Ibid., 7.

[33] Richard Rosecrance, "Power and International Relations: The Rise of China and Its Effects," *International Studies Perspectives* 7 (2006): 32–35.

Table 1. Top 10 Trading Partners with Mainland China (in billion dollars)[34]

1. United States	$521	6. Germany	$161.56
2. Hong Kong	$401	7. Australia	$136.37
3. Japan	$312.55	8. Malaysia	$106.07
4. South Korea	$274.24	9. Brazil	$90.27
5. Taiwan	$197.28	10. Russia	$89.21

From a liberal institutionalist perspective, China participates in a multitude of liberal international governmental organizations. These organizations promote cooperation among states, and constrain China's behavior so it can continue to participate in and profit from these organizations. Justin S. Hempson-Jones argues China joins three specific categories of liberal institutions. First, China extensively participates in liberal economic institutions like the International Monetary Fund, the World Bank, and World Trade Organization. These international governmental organizations are the most important and high profile economic institutions. In order to join these organizations, China had to voluntarily give up some of its sovereignty as preconditions for membership. For example, China had to agree to currency devaluation, trade restrictions, domestic privatization, and internal regulatory reform. The loss of sovereignty still has afforded China absolute gains, since it was able to participate in the globalized economy and fuel its sustained growth. One proponent of liberal economic institutions argues that this practice taught the PRC to shift its mindset, "from rule of man to rule of law" teaching the population a "culture of law."[35]

Second, China participates in international political institutions. As mentioned above under the English School, China is a major stakeholder in the UN as a permanent member of the Security Council and participant in peacekeeping operations. Over time, China's attitude toward the UN changed from initially dismissing it as a tool for

[34] China Daily, "Top 10 Trading Partners of the Chinese Mainland," *China Daily*, February 19, 2014, http://www.chinadaily.com.cn/bizchina/2014-02/19/content_17290565.htm.

[35] Justin S. Hempson-Jones, "The Evolution of China's Engagement with International Governmental Organizations: Toward a Liberal Foreign Policy?" *Asian Survey* 45, no. 5 (October 2005): 708–709, (hereafter cited as "Evolution of China's Engagement with IGOs"). ; Richard H. Holton and Xia Yuan Lin, "China and the World Trade Organization: Can the Assimilation Problems Be Overcome?" *Asian Survey* 38, no. 8 (August 1998): 746; from Hempson-Jones, "Evolution of China's Engagement with IGOs," 710.

imperialist powers to a valid institution for dispute resolution and mitigation. Former PRC Foreign Minister Wu Xueqian said:

> In the past 40 years the United Nations has followed a tortuous path and made some erroneous decisions. But on the whole, we should affirm its effective efforts to maintain peace, prevent and ease conflicts, accelerate decolonization, and promote international cooperation.[36]

Yet some UN actions, particularly humanitarian intervention, contradict the PRC's Five Principles of Peaceful Coexistence. Therefore China began supporting selected UNSC votes that contradicted the Five Principles, rather than blocking UN actions with a veto (for example China voted in support of the 1992 and 1993 UNSC resolutions authorizing the humanitarian intervention in Somalia or the 1994 humanitarian intervention into Haiti).[37] With that said, China vetoes other UNSC measures that pressured an ally or strategic partner (for example the PRC voted against the 2007 UNSC condemnation of human rights abuses in Myanmar because it has a long standing relationship with China). China also votes against UNSC agendas that can be used as precedence against its authoritarian control of its people (for example the 2014 UNSC condemnation of human rights abuses in Syria).[38]

Finally, China participates in security institutions like the ASEAN Regional Forum. Although China is a non-charter member of ASEAN, it acts as a highly influential observer. China participates in this organization and conducts multilateral negotiation despite its preference to bilateral negotiation. Critics argue the ASEAN Regional Forum makes declarations (particularly on behavior in the South China Sea), yet has no enforcement or sanctioning mechanisms to reign in PRC behavior.[39]

Hempson-Jones concludes that China fully participates in economic institutions but marginally participates in political and security institutions. The loss of economic

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[36] Wu Xueqian from Hempson-Jones, "Evolution of China's Engagement with IGOs," 712.

[37] Jonathan E. Davis, "From Ideology to Pragmatism: China's Position on Humanitarian Intervention in the Post-Cold War Era," *Vanderbilt Journal of Transnational Law* 44, no. 2 (March 2011): 230–235.

[38] United Nations, "UN Research Guides and Resources: Security Council—Veto List," Dag Hammarskjold Library, *United Nations*, accessed September 1, 2014, http://www.un.org/depts/dhl/resguide/scact_veto_en.shtml; Buzan, "China in International Society," 15.

[39] Hempson-Jones, "Evolution of China's Engagement with IGOs," 718–719.

sovereignty is more tolerable than a loss in the political and security realm. Despite some controversial UNSC vetoes, China constrains its behavior to conform toward international institutions for diplomatic leverage and gain. This restrained behavior promotes cooperation among states participating in international institutions thereby reducing armed conflict through diplomatic dispute resolution.

Examining Chinese behavior related to maritime territories and international law reveals conduct both inside and outside legal norms. Although China refuses to participate in UNCLOS-sanctioned arbitration (as observed in the 2013 South China Sea arbitration with the Philippines), it does promise to adhere to international law when settling maritime disputes. China's behavior around the disputed maritime territories could devolve into war, yet it has not. In the case of China's East and South China Sea patrols, the ships happen to be maritime law enforcement vessels as opposed to naval combat ships. The employment of these maritime law enforcement vessels sends a geopolitical signal to prevent escalation and support China's law-based claim.[40]

Despite the optimism of liberal theories based on economics and institutions, not all liberal theories are optimistic. Aaron Friedberg argues one liberal pessimist theory explains China is susceptible to conflict. As an insecure authoritarian regime, China may engage in conflict because of "dubious legitimacy with an uncertain grip on power."[41] For example, if China's economy faltered, domestic unrest may ensue. In order to preserve its legitimacy and distract the populace, the Chinese Communist Party might incite nationalism to support a conflict. The ensuing conflict would deflect antagonistic sentiment from the regime toward a perceived existential threat. This pessimistic liberal theory could potentially steer China on a course toward conflict over disputed islands.[42]

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[40] United Nations, "United Nations Convention on the Law of the Sea," United Nations, December 10, 1982, http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm, (hereafter cited as "UNCLOS").

[41] Friedberg, "Future of U.S.-China Relations," 29.

[42] Ibid., 29–31.

6. Conclusion

To sum up, despite declaring peaceful and benevolent intentions, China's behavior toward its maritime disputes can reveal its intention to rise peacefully or belligerently. IR theories like offensive and defensive realism, the English School of realism, and liberalism explain Chinese actions in the East and South China Seas in analytic frameworks. A defensive realist argument can be made if China maintains a low profile and its actions do not inspire counterbalancing and security dilemmas among its maritime neighbors. An offensive realist argument can be made if China's actions are power maximizing. The offensive realists would expect China to use power to forcibly take the islands from less powerful countries in an irredentist land grab. Within the English School of realism, China selectively picks and chooses which international societal norms and rules to follow based on its strategic interests. Barry Buzan defined this behavior as reformist revisionist because China adheres to some laws and norms yet attempts to revise other laws and norms. China refuses UNCLOS arbitration and prefers to settle territorial disputes through bilateral negotiation where it can use economic strength, political power, and military intimidation (actions short of war) against a state. This power play can be seen as belligerent and expansionist for the region, or as a defensive strategy to maintain its security, or as picking and choosing among the two. Among liberal institutionalists, China participates in international governmental organizations institutions like the WTO and UN. China's participation in these organizations constrains its behavior allowing it to rise peacefully.

No single theory can elucidate every occurrence in geopolitics. Analysis of international law in maritime disputes can help provide an answer to identify which IR theory best explains China's behavior. If China completely ignores the role of international law by acting belligerently, then its behavior conforms to offensive realism. However, if China diligently builds a legal case for its actions, then perhaps it subscribes to a liberal institutionalist point of view and is truly rising peacefully. Perhaps it largely plays by the rules, as the English School suggests, and only seeks revision of the margins. This thesis intends to shed light on these questions.

D. POTENTIAL EXPLANATIONS AND HYPOTHESES

In maritime disputes as controversial as the Senkaku Islands, the Paracel Islands, and the Scarborough Shoal, multiple points of view support and contradict China's claim. Scholars who defend China's claims in international law use history to justify their arguments. In looking at China's legal cases over the disputed islands, the question that needs to be asked is if the structure of the legal system constrains and shapes China's behavior to act the way it does. The IR literature suggests three possible answers: 1) China's behavior is not constrained by law, but by power and security dynamics. It will therefore ignore international law when it conflicts with enhancing Chinese power or security, and it will use all means, up to and including limited or all-out war, to achieve them. (It will conveniently side with international law when it is advantageous to do so when the outcome of international law aligns with national objectives);[43] 2) China's behavior is constrained by international law. It will therefore seek to abide by the rules of UNCLOS but peacefully attempts to use those rules and norms to its advantage.[44] 3) A middle ground where China is constrained by some aspects of international laws and norms but also selectively redefines norms to suit its self-interests, peacefully and through the use of force, short of limited war.[45]

This thesis will examine four hypotheses for Chinese behavior. The first hypothesis this thesis will examine is that contemporary international law (such as UNCLOS and court verdicts) constrains and shapes China's behavior in the East and South China Seas and leads to low intensity conflict (conflict short of limited war). If true, such an argument would strengthen the case for those who suggest China is constrained by international law and norms. By demonstrating behavior constrained by international law, evidence would support proponents of liberal institutionalism, giving credence for a peaceful rise. In this optimistic hypothesis China builds a compelling legal

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[43] Shambaugh, "Conflicted China," 12; Mearsheimer, "The Gathering Storm," 382–385.

[44] Hempson-Jones, "Evolution of China's Engagement with IGOs," 710–719; Friedberg, "Future of U.S.-China Relations," 12–14.

[45] Barry Buzan, "China in International Society: Is 'Peaceful Rise' Possible?" *The Chinese Journal of International Politics* 3 (2010): 9–16; Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd ed. (London: Macmillan, 1977), 65–70.

case to defend its claim to disputed territories (within legally accepted norms). It then utilizes diplomacy and dispute resolution institutions set forth by the United Nations to resolve maritime disputes through mediation or arbitration.

However, if evidence shows that international law disadvantages China, it should reject international law, in line with realist predictions. This pessimistic hypothesis would initially appear as militarized saber-rattling evolving into militarized conflict in the East and South China Seas to seize disputed maritime claims. The militarized conflict could lead to war between China, its neighbors, and potentially the United States. Realism offers two alternative explanations of why China acts as it does towards the islands.

The first alternative realist explanation and second thesis hypothesis asserts China is an irredentist nation that uses force to compel weaker countries to yield to China's desires. Contesting the islands is a challenge to regional countries' resolve. In this offensive realist hypothesis, China is expected to use hard power to expand its vital national interests, to include expanding territorially in the region, when it is advantageous to do so. The use of power, in its extreme form, could be full-fledged military conflict. In this situation, China should ignore international law that attempts to constrain its acquisition of power resources.

The second alternative realist explanation and third thesis hypothesis contends that China acts passively, avoiding actions leading to strategic miscalculation, security dilemmas, and balancing against itself. China reserves the right to defend its perceived sovereign territory with anything, including full-fledged military conflict. However, it must do so as a state defending its interests as opposed to a state expanding its territory. China must demonstrate a defensive intent as opposed to an irredentist one. As with offensive realism, China should ignore international law if and when it seeks to prevent China from securing its vital national interests.

A middle ground, where Chinese behavior is constrained by international law in some cases, especially those that threaten the fundamental institutions of international society, would lend credence to the English School. This fourth hypothesis would show China adheres to some of rules described in the English School but opts out or redefines

its adherence to other rules. For example, China would respect the rules for coexistence but attempt to rewrite its definition of how sovereignty is determined in maritime disputes. China would demonstrate respect for sovereignty by avoiding war on claimed islands occupied by a foreign nation. However, China would also attempt to rewrite the norms on how maritime sovereignty is determined by using a Sino-centric historic waters argument backed up by maritime law enforcement.

This thesis will demonstrate that International Court of Justice (ICJ) and Permanent Court of Arbitration (PCA) maritime dispute precedents are weighted toward the demonstration of the legal principle known as effective control. International courts resolve sovereignty cases based on many legal arguments, including treaty law, effective control, geography, history, and *uti possidetis*. However research suggests that effective control, or the demonstration of a state's sovereignty over a territory, is the most compelling argument that courts use to decide maritime territorial disputes. In order to strengthen its legal case, China repeatedly demonstrates effective control across disputed maritime claims through a strategy known as legal warfare.

Demonstrations of effective control include the use of maritime law enforcement vessels to administer sovereignty in perceived territorial waters (i.e., fishing bans), or the construction of public works on the islands. These demonstrations appear self-serving as arguable misinterpretations of UNCLOS.[46] Yet China does not outright invade (or defend) its claims using militarized violence. Instead, China walks a narrow line by following a strategy of legal warfare to enforce effective control over what it perceives as its sovereign territory. This thesis will evaluate China's behavior in these maritime disputes in light of the hypotheses proposed to determine which one best explains China's actions.

E. RESEARCH DESIGN

The research will draw from scholarly articles written about ICJ and PCA cases, court documents related to the island disputes themselves, scholarly articles regarding

[46] Rupert Wingfield-Hayes, "China's Island Factory," *BBC News*, September 9, 2014, http://www.bbc.co.uk/news/special/2014/newsspec_8701/index.html.

Chinese foreign policy, as well as official government statements made by the claimant countries. The three maritime disputes were chosen because of minor variation in each of the three cases. The disputes required China and one other country to be the claimants. (The Spratly Islands did not meet these criteria because the island group is claimed by six parties [China, Taiwan, Philippines, Malaysia, Brunei, and Vietnam].) The Senkaku Islands were chosen because this is a case where China does not maintain *de facto* control, Japan is a security ally with the United States, it possesses a comparable naval to balance against China, and the islands are outside of the Nine Dash Line. The Paracel Islands were chosen because China maintains *de facto* control, Vietnam does not fall under any treaty protection of the United States, its navy is weaker than the PLAN, and the disputed islands reside within the Nine Dash Line. The Scarborough Shoal was chosen because China maintains *de facto* control over the shoal, the Philippines are a security ally of the United States, the Philippine Navy is incapable of countering the Chinese Navy, and it resides within China's Nine Dash Line. The shoal (like many formations in the Spratly Island Chain) is not considered an island by UNCLOS standards and will utilize a different legal argument. Table 2 summarizes the cases.

Table 2. Case selection criteria

	Senkaku Islands (Japan)	Paracel Islands (Vietnam)	Scarborough Shoal (Philippines)
China Maintains *De Facto* Control	No	Yes	Yes
Security Alliance With the U.S.	Yes	No	Yes
Comparable Naval Capability	Yes	No	No
Within China's Nine-Dash Line	No	Yes	Yes

1. Indicators of Successful or Unsuccessful Hypothesis

This thesis will test the four hypotheses and assess which framework best describes China's behavior in the three maritime disputes. The first hypothesis will test offensive realism. Does China use hard power to take advantage of weaker states that it maintains a clear power advantage over? This hypothesis will account for power disparity

among China and fellow maritime claimants. It will also assess the role international law and its potential to constrain Chinese behavior. The second hypothesis will test defensive realism. Does Chinese behavior related to its maritime disputes encourage security competition and balancing against it? Again, this hypothesis will assess the role of international law. In these first two hypotheses, adherence to international law and norms when it does not advantage China would disprove both offensive and defensive realism. The third hypothesis tests the liberal institutionalist framework. If China conforms to international laws and norms (to include UNCLOS and ASEAN) its behavior would align with liberal institutionalism. In order for this framework to apply, China's behavior must be constrained by these institutions. Finally, the fourth hypothesis tests the English School of Realism. In this framework, Chinese behavior would conform to some norms and rules yet attempt to revise other norms and rules. Chinese behavior is expected to conform to rules for coexistence. Yet its behavior is expected to revise legal rules on how the maritime sovereignty is determined.

F. THESIS OVERVIEW AND DRAFT CHAPTER OUTLINE

This first chapter of the thesis establishes the research questions and their theoretical basis in international relations theory. The thesis will examine whether contemporary international law (UNCLOS) constrains Chinese behavior in the East and South China Seas. If true, then China's behavior in maritime disputes is evidence of a peaceful rise as a status quo power.

Chapter II analyzes ICJ, PCIJ, and PCA court verdicts to show that courts use effective control as a conclusive factor in the settlement of maritime disputes. An inadvertent consequence of the courts' decisions is that the determining principle of effective control may promote land grabs and the potential use of force. Chapter III analyzes the legal cases for the Senkaku Islands, Paracel Islands, and Scarborough Shoal dispute. The chapter will argue that China has a weak claim to the Senkaku Islands and Scarborough Shoal, while it has a strong claim to the Paracel Islands. This chapter will establish how legal-case weakness may lead China to pursue demonstrations of effective

control. Chapter IV will show how China demonstrates effective control though the strategy of legal warfare.

The thesis will conclude with an assessment of which IR framework best describes China's strategy and behavior related to its maritime disputes. After examining four IR theories (defensive realism, offensive realism, the English School of Realism, and liberal institutionalism) the thesis will suggest China's use of legal warfare provides evidence that offensive realism and the English School of Realism are two IR frameworks that explain China's behavior related to its maritime disputes. China's behavior is reflective of offensive realism because it acts in an irredentist manner while using international law and legal warfare to disguise its expansionist intent. The English School of Realism is another IR framework that describes Chinese behavior because China conforms to some international norms and laws while attempting to revise the internationally accepted way sovereignty is determined.

II. EFFECTIVE CONTROL IN MARITIME DISPUTES

Does China's behavior regarding its maritime disputes have a sound basis in contemporary international law? In order to answer this question, this thesis must first examine contemporary international law and identify the key legal factors used in resolving maritime disputes.

A. INTRODUCTION

In the context of this thesis, understanding trends in contemporary international law can help explain China's behavior toward maritime disputes. Determining trends in contemporary international law is vital in assessing the strength of China's legal claims. Additionally, understanding legal trends could support China's claim its behavior is grounded in international law. Conversely, a study of international law can support accusations China's behavior is expansionist.

This chapter will focus on the settlement of maritime disputes in accordance with international law. More specifically, it will identify determinative elements that international courts use to decide maritime territorial cases. This chapter will attempt to answer the following questions: First, do court decisions emphasize one legal argument over other legal arguments? Second, if trends do exist, can they be used (or abused) by countries to strengthen a state's case for ownership or sovereignty? For example, if maritime patrols support a case for maritime sovereignty, this can refute accusations China acts in an expansionist manner when it is really defending its sovereignty.

To answer the first question, this chapter will use the case study method to analyze ten verdicts from the Permanent Court of Arbitration (PCA), Permanent Court of International Justice (PCIJ), and International Court of Justice (ICJ). The ten cases represent all maritime territorial cases decided in international courts. The case analysis will show the verdicts of maritime territorial disputes are overwhelmingly concluded using the principle of effective control over other legal arguments, such as treaty law, *uti possidetis*, history, or geography to name a few. Next, the chapter will attempt to analyze why effective control is decisive in most cases instead of treaty law or *uti possidetis*.

Finally, if states recognizes effective control is the gold standard to determine sovereignty, states will do their utmost to demonstrate effective control in maritime disputes even though it provokes other claimant states increasing regional tension.

Demonstration of effective control can be as simple as passing domestic legislation on the governance of a faraway disputed maritime claim, or more laborious like constructing a hospital and providing public health care for the residents of an island. An insight into court trends could validate (or refute) China's legal claim to the Senkaku Islands, Paracel Islands, or Scarborough Shoal. This insight could become the basis of Chinese policy or legal strategy to strengthen its claim in maritime disputes. Additionally, the pursuit (or lack of pursuit) of a legal strategy can be a critical indicator as to which international relations theory best explains China's behavior. Pursuit of a legal strategy would indicate China's behavior is explained by liberal institutionalism or the English School of Realism. Ignoring the role of effective control and other legal arguments could demonstrate China's behavior is explained by a realist school of international relations.

1. Methodology

In his article, "Territorial Disputes at the International Court of Justice," Brian Taylor Sumner analyzed how international courts settle territorial disputes. Sumner's analysis of territorial disputes in the ICJ revealed claimants argue cases based on nine categories: treaties, geography, economy, culture, effective control, history, *uti possidetis*, elitism, and ideology. Sumner analyzed nine land and maritime territorial disputes resolved in the ICJ and found treaty law, *uti possidetis*, and effective control were the determinative factors for the court's verdict.[47] Additional analysis of this trend was conducted by the Carter Center by adding five additional territorial verdicts from the PCA, and it confirmed Sumner's findings.[48]

[47] Brian Taylor Sumner, "Territorial Disputes at the International Court of Justice," *Duke Law Journal* 53 (2004): 1779–1812, (hereafter cited as "Territorial Disputes at the ICJ").

[48] The Carter Center, *Approaches to Solving Territorial Conflicts: Sources, Situations, Scenarios, and Suggestions* (Atlanta, GA: The Carter Center, May 2010), 1–16 (hereafter cited as *Solving Territorial Conflicts*).

Furthermore, Sumner revealed the court's decision-making sequence was hierarchical. Courts attempted to settle the case using treaty law first, then *uti possidetis*, and finally effective control. The court initially reviews treaty law to determine a legal title. When no clear title exists, the court moves on to consider *uti possidetis* (or the continued exercise of sovereignty bequeathed from a colonial power). The court reviews evidence the colonial power (if applicable) bequeathed the territory to the post-colonial state. If no evidence is available, the court reverts to demonstrations of effective control. The court assesses the colonial and post-colonial demonstrations of effective control to decide a verdict. Again, the decision process is hierarchical; therefore if the court can render a verdict by reviewing treaty law alone, then there is no need for the court to consider evidence of *uti possidetis* or effective control. In the 1994 ICJ case *Libya v. Chad*, the court decided the case solely on treaty law and dismissed all other evidence provided by Libya and Chad.[49] Surprisingly, between the two studies, history alone was not a major factor in reaching a verdict. Although history was used most frequently by the claimants to establish first possession and the duration of the possession, the court did not find this compelling.[50]

The Carter Center goes on to assert although the three factors (treaty law, *uti possidetis*, and effective control) are compelling, an "unclear prioritization of legal norms continues to make decision making by the Court in territorial cases somewhat unpredictable."[51] This observation may be true in looking at both land and maritime disputes, however when only looking at maritime disputes a different conclusion is reached. Further analysis of the findings from Sumner and the Carter Center reveal that, within maritime territorial disputes, effective control is the single most compelling argument for courts.

[49] Sumner, "Territorial Disputes at the ICJ," 1803–1804.

[50] Ibid., 1807–1808.

[51] Carter Center, *Solving Territorial Conflicts*, 2.

2. Definitions

To begin the discussion on court decisions and sovereignty it is necessary to establish definitions. Since much of this chapter is based on Brian Taylor Sumner's analysis, it is important to use his definitions. UNCLOS also provides relevant legal definitions for maritime features like seas and islands.

a. Treaty Law

Treaty law acts as a legal contract among states. Historically treaties have ended wars, established trade, and granted legal titles to territories just to name a few functions of treaties. For example, the Treaty of Peace between the United States and Spain (also known as the Treaty of Paris 1898) ended the Spanish American War and relinquished the Spanish title for Puerto Rico, Guam, and the Philippines to the United States.[52] Sumner accurately identifies in many contemporary cases, the claimant states are sometimes not members of the original parties since the original parties were former colonizers or states no longer in existence.[53] For example, the Treaty of Sèvres (1920) and the Treaty of Lausanne (1923) partitioned the Ottoman Empire following World War I. Modern day states like Jordan, Syria, and Iraq, were not parties to the treaties since they did not exist in 1920; however, their title lineage and borders can be traced to both treaties.[54]

b. Uti Possidetis

Sumner defines *uti possidetis* as a principle in "defining post-colonial boundaries" based on colonial administration. In other words, newly formed states that were former colonies assume the boundaries established by the previous colonizing state.[55]

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[52] United States and Spain, "Treaty of Peace between the United States and Spain," December 10, 1898, http://avalon.law.yale.edu/19th_century/sp1898.asp.

[53] Sumner, "Territorial Disputes at the ICJ," 1784–1785.

[54] British Empire et al., "Treaty of Sèvres," August 10, 1920, http://wwi.lib.byu.edu/index.php/Section_I, Articles_1_-_260; British Empire et al., "Treaty of Lausanne," July 24, 1923, http://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne.

[55] Sumner, "Territorial Disputes at the ICJ," 1790.

c. Effective Control (or Effectivités)

Sumner defined effective control as the unambiguous exertion of state power in a territory or population. He also draws a parallel to how possession is a decisive determination in property law (also known as possession is nine tenths of the law). Effective control can be demonstrated by providing examples of governance on a territory.[56]

d. Acquiescence (or Abandonment)

Acquiescence is the legal principle that a state has given up its claim to a territory. By divesting its claim, another state can take the vacated territory. Failure to exert a minimum amount of effective control can constitute acquiescence. In some legal cases, effective control works hand in hand with acquiescence. Not only must a claimant prove it demonstrated effective control over a territory, it must also show the competing claimant gave up on its claim to the territory.[57]

e. Territorial Sea

UNCLOS breaks the oceans into four distinct zones, the territorial sea, contiguous zone, exclusive economic zone, and high seas. Each zone entitles the coastal state different sovereign rights and economic potential. A territorial sea is the continuation of a state's sovereignty on land extending 12 nautical miles into the water. The territorial sea originates from a state's mainland shore or island. The 12 nautical miles is measured from the state's low tide line on land. (See Figure 1)[58]

f. Contiguous Zone

A contiguous zone extends from the termination of the territorial sea (at 12 nautical miles) out to 24 miles from land (or the baseline). Within this zone the state can enforce the same laws and regulations it enforces on its territory or within its territorial

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[56] Ibid., 1787.

[57] Ibid.

[58] United Nations, "UNCLOS."

sea. These laws include customs enforcement, immigration control, or sanitation laws. (See Figure 1)[59]

g. Exclusive Economic Zone

The exclusive economic zone (EEZ) grants the coastal state exclusionary rights to extract economic resources from the waters, seabed, and its subsoil. The zone begins from the land and extends 200 nautical miles from the coastline. Within the EEZ, the coastal state is authorized to construct artificial islands and structures, conduct scientific research, and preserve and protect the environment. (See Figure 1).[60]

[59] Ibid., 35.

[60] Ibid., 43–44.

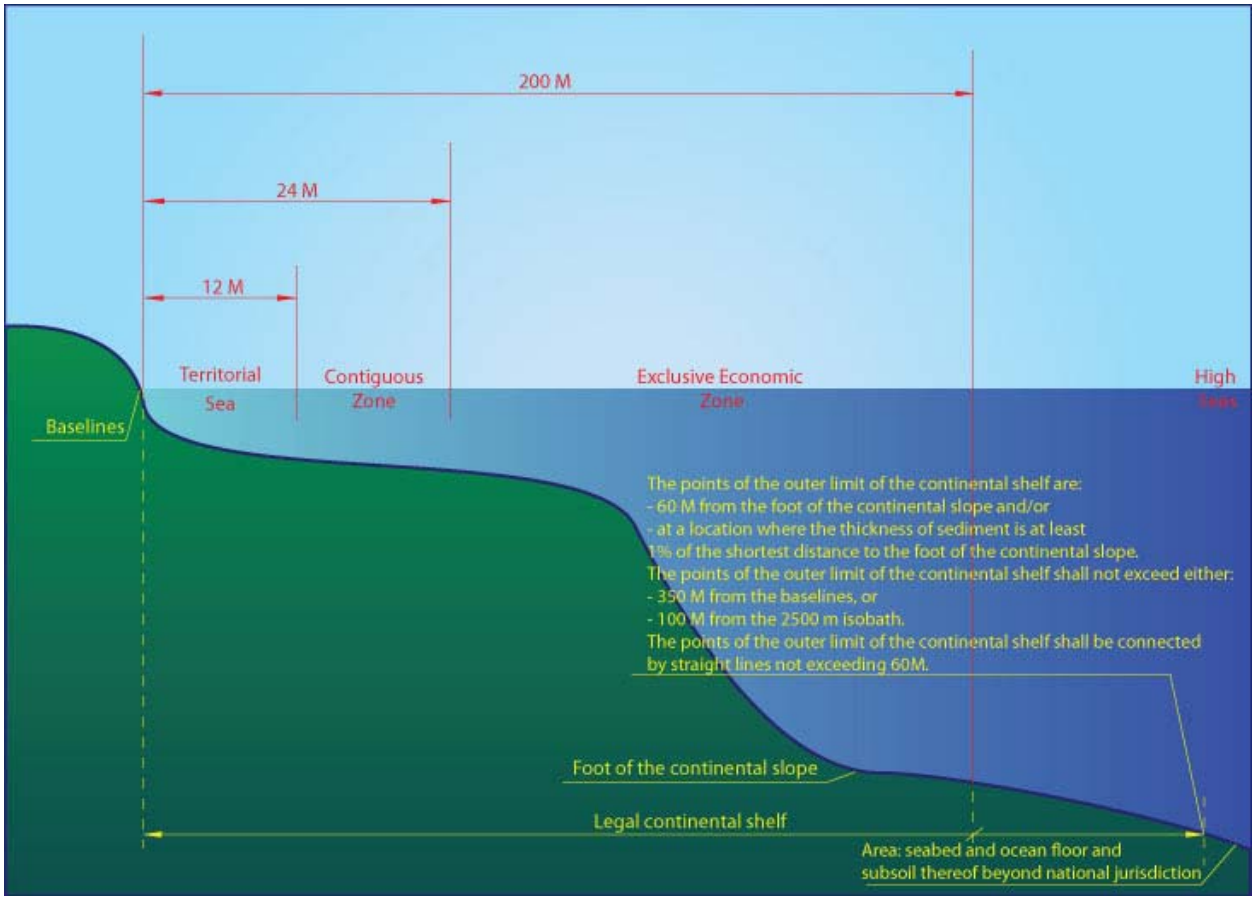

Figure 1. Illustration showing the maritime zones[61]

h. Islands

Based on UNCLOS, an island is defined as "a naturally formed area of land, surrounded by water, which is above water at high tide."[62] Islands are entitled to a territorial sea, contiguous zone, and exclusive economic zone. Reefs that rise above the water at low tide are considered attached to islands.[63] Artificial islands do not obtain the right of a territorial sea, contiguous zone, or an exclusive economic zone.[64]

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[61] United Nations, "UNCLOS Maritime Zones," *UNCLOS Maritime Zones*, 1982, http://www.un.org/depts/los/clcs_new/marinezones.jpg.

[62] United Nations, "UNCLOS," 66.

[63] Ibid., 27.

[64] Ibid., 45.

i. Rocks

Rocks are geographic features that rise above the water at high-tide. They are unable to "sustain human habitation or economic life of their own."[65] Rocks are entitled to a territorial sea but not entitled to a contiguous zone or exclusive economic zone.[66]

j. Low-Tide Elevation

A low-tide elevation is a naturally formed land feature (like a sand bar or reef) that is partially or completely above water at low tide and completely submerged during high tide. Low-tide elevations can be used to draw maritime baselines based on the exposed land during low-tide.[67] Because low-tide elevations are not islands or rocks, courts cannot determine sovereignty unless it is located within a territorial sea.

k. High Seas

High seas is the water outside of the territorial sea, contiguous zone, exclusive economic zone, internal waters of a state, and archipelagic waters of an archipelagic state.[68]

B. CASE ANALYSIS OF MARITIME DISPUTES IN THE PCA, PCIJ, AND ICJ

Using the work done by Sumner and the Carter Center, this thesis will now review the maritime territorial disputes of the PCA, PCIJ, and ICJ to reveal the determinative influences for each verdict. This section will also highlight how states have demonstrated effective control in order to win their case. All the cases chosen deal with the sovereignty of disputed maritime territories. The cases chosen will not discuss disputes over land, river islands, or maritime delimitation (like the demarcation of exclusive economic zones, or the extension of land borders onto the water separating two states). Some of these cases settled questions on land boundaries in addition to maritime

[65] Ibid., 66.

[66] Ibid.

[67] Ibid., 29.

[68] Ibid., 57.

claims. To maintain focus on the argument, this section will ignore any portion of a case deciding the sovereignty distribution of land territory. The 10 cases used in this study represent all maritime territorial disputes decided in an international court.

1. *United States v. Netherlands* (Island of Palmas, 1928)

As the result of the Spanish American War, the United States gained control of the Philippines from Spain. The United States argued it owned the Island of Palmas because it was included in the greater Philippine archipelago as bequeathed by Spain through the 1898 Treaty of Paris. Yet the Dutch contended the island was part of their claim to the Dutch East Indies. The PCA found treaty law was inconclusive since the treaties failed to mention the island by name or location and the Netherlands were not party to the treaties.[69]

Logically, U.S. possession of the island was based on Spain's possession and subsequent demonstration of effective control. The arbiter found a lack of evidence could not reinforce the U.S. argument of Spanish control over the island.[70] However the Netherlands claimed the Island of Palmas in its colonial claim to the Dutch East Indies. The arbiter found the actions of the Dutch East India Company represented the acts of the government of the Netherlands. Therefore actions by the Dutch East India Company constituted Dutch effective control.

Although infrequent, the Netherlands provided peaceful and effective rule over the island.[71] Demonstration of Dutch effective control included but was not limited to, contracts with the local population, hoisting a Dutch flag as witnessed by the locals in 1700, and tax collection.[72] The arbiter, Max Huber, decided Spain failed to contest Dutch control over the island when it withdrew to Molucca in 1666. Failure to contest the effective control constituted acquiescence.[73] Max Huber, ruled in favor of the

[69] Netherlands v. United States, 831, 850, (Permanent Court of Arbitration 1928).

[70] Ibid., 851–852.

[71] Ibid., 867–869.

[72] Ibid., 864–866.

[73] Ibid., 868.

Netherlands by saying, "The Netherlands' tide of sovereignty, acquired by continuous and peaceful display of State authority during a long period of time going probably back beyond the year 1700, therefore holds good."[74]

2. *Norway v. Denmark* (Legal Status of Eastern Greenland, 1933)

In 1933, the Permanent Court of International Justice (PCIJ) settled the dispute between Norway and Denmark on the sovereignty of Greenland. Denmark argued it owned the entire island of Greenland. Norway contended it owned Eastern Greenland because it was *terra nullius* and Denmark's ownership only extended as far as its existing settlements. The PCIJ initially reviewed treaty law and concluded the 1814 Treaty of Kiel specifically ceded Greenland to Denmark.

However, the court needed to determine if Denmark maintained effective control over the entire island after the 1814 Treaty of Kiel. Recognizing it was difficult for states to demonstrate unambiguous effective control over remote and "thinly populated" areas, the court established a low bar for evidence.[75] This landmark decision influenced all other legal settlements over remote or unoccupied land. The court established the definition of effective control as: "The intention and will to act as sovereign, and some actual exercise or display of such authority."[76] The court found Danish diplomatic correspondence and multilateral commercial treaties, which incorporated the entirety of the island, represented evidence to act as sovereign. The PCIJ also cited the Danish issuance of visitation permits, as well as hunting and scientific expeditions endorsed by the government were additional displays of authority on the eastern side of Greenland.[77]

Also compelling was evidence Norway acquiesced its claim to Greenland. Denmark argued, in what would become known as the Ihlen Declaration, Norway's Minister of Foreign Affairs relinquished its claim to Greenland. On 14 July 1919, the Danish Minister asked the Norwegian Minister for Foreign Affairs, Nils Claus Ihlen, for

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[74] Ibid., 869.

[75] Denmark v. Norway, 4, 28, (Permanent Court of International Justice 1933).

[76] Ibid.

[77] Ibid., 44–45; Charles Cheney Hyde, "The Case Concerning the Legal Status of Eastern Greenland," *American Journal of International Law* 27, no. 4 (October 1933): 736.

recognition of "Denmark's sovereignty over the whole of Greenland."[78] Eight days later, on 22 July, Ihlen replied, "…the Norwegian Government would not make any difficulties in the settlement of this question."[79] The 22 July statement from the Norwegian Minister for Foreign Affairs became known as the Ihlen Declaration and provided Denmark with Norwegian recognition of its claim to Greenland. The court agreed with this point of view by stating:

> The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.[80]

Therefore, based on the demonstration of Danish effective control as well as Norwegian acquiescence, the PCIJ ruled Greenland fell under the sovereignty of Denmark. This landmark case codified the definition of effective control and justified the low bar for its demonstration. This low standard of effective control will be relevant to subsequent cases as well as Chinese maritime disputes.

3. *France v. United Kingdom (*Minquiers and Ecrehos, 1953)

In 1953, the ICJ ruled on the sovereignty of two groups of islets, Minquiers and Ecrehos. Both island groups were claimed by France and the United Kingdom with a record of possession dating back to the ninth century. The court considered historic documents and treaties but concluded the wealth of documents from both sides were insufficient in compelling the court to decide a clear victor. Therefore the court focused on effective control to determine sovereignty.[81]

The court ruled in favor of the United Kingdom finding its demonstration of effective control as more compelling than the French arguments. The court identified a close relationship between the disputed maritime territories and the neighboring British

[78] *Denmark v. Norway*, 52.

[79] Ibid.

[80] Ibid., 53.

[81] France v. United Kingdom (Summary), 1, 1–3, (International Court of Justice 1953).

island of Jersey. The local government of Jersey provided on-island administration over an oyster fishery, presided over criminal proceedings, levied taxes on houses, and registered real estate contracts.

France argued it maintained sovereignty over the islands through a fishing convention and by placing navigation buoys. Because the United Kingdom never protested French effective control, France made a case for acquiescence. However, the court discounted these examples of effective control because it covered the administration of the waters surrounding the disputed claim and not on land.[82]

4. *El Salvador v. Honduras* (Land, Island and Maritime Frontier Dispute, 1992)

In 1992, the ICJ decided the land and maritime boundaries between El Salvador and Honduras. The court also decided on the sovereignty of three islands in the Gulf of Fonseca (El Tigre Island, Meanguera Island, and Meanguerita Island). This brief summary will concentrate on the legal arguments concerning the three islands and not the land or maritime boundaries. The court attempted to use *uti possidetis* to determine a title. However, it found *uti possidetis* was "too fragmentary and ambiguous" to determine a clear conclusion on title.[83] Spanish colonial law, the former Federal Republic of Central America, and successor states failed to clearly bequeath the islands to El Salvador or Honduras due to the limited population on the island or scant economic value of the islands. The court was forced to pursue examples of post-colonial (after 1821) effective control as examples of Spanish colonial intent. Additionally the court looked for examples of acquiescence to solidify its judgments.[84]

[82] Ibid.; D. H. N. Johnson, "The Minquiers and Ecrehos Case," *The International and Comparative Law Quarterly* 3, no. 2 (April 1954): 197–207, 209–215.

[83] El Salvador v. Honduras, 4, 29, (International Court of Justice 1992).

[84] Ibid., 28–30.

a. El Tigre Island

The court found Honduran settlement and administration of El Tigre Island, as early as 1933, provided evidence Spain intended the island to go to Honduras.[85] Evidence of Honduran effective control included multiple examples of international diplomacy. First, to recoup debts from Honduras and El Salvador, the British Government occupied El Tigre Island. A month after the invasion, British correspondence revealed military authorities specifically returned the island to Honduras. Second, Honduras signed an agreement with the United States to cede the island to the United States for eighteen months. Third, in 1854, Honduras sold parts of El Tigre to foreign powers. El Salvador protested the sale of El Tigre and the potential sale of Meanguera Island but never questioned Honduras's right to sell El Tigre. This second point provided the court an example of El Salvador's acquiescence.[86] Fourth, in 1873, El Salvador invaded El Tigre Island but returned the island to Honduras a year later. Once again this constituted El Salvadorian acquiescence. If El Salvador truly believed the island was theirs then they should have occupied the island outright instead of returning the island to Honduras. Fifth, Honduras and El Salvador used El Tigre Island as a geographic reference point dividing the two countries. El Salvador failed to lodge a protest providing even more evidence of acquiescence. The court recognized the five examples of Honduran effective control took place shortly after Honduran independence in 1821. Therefore, the court concluded the five examples were unambiguous demonstrations of Honduran effective control granting El Tigre Island to Honduras.[87]

b. Meanguera Island and Meanguerita Island

The court found numerous examples of El Salvadorian effective control and administration covering Meanguera Island and Meanguerita Island. The government of El Salvador submitted as evidence a lengthy dossier of records showing it conducted administrative functions of a state on Meanguera Island and Meanguerita Island: it hired

[85] *El Salvador v. Honduras*, 220.

[86] Ibid., 221.

[87] Ibid., 219–223.

justices of the peace, appointed military authorities, issued licenses, held elections, collected taxes, conducted censuses, tracked births/deaths, registered land, conducted criminal and civil proceedings, provided postal services, constructed infrastructure (electricity, schools), offered health care, and provided education. El Salvador even provided witnesses to confirm the above.[88]

Honduras could not provide any evidence of effective control on the island. Instead it criticized El Salvador's effective control as a violation of the 1969 General Treaty of Peace by altering the status quo on a disputed territory.[89] The court interpreted Nicaragua's lack of evidence and subsequent protest as acquiescence and agreed Meanguera and Meanguerita Islands belonged to El Salvador.[90]

5. *Eritrea v. Yemen* (Red Sea Islands, 1998)

The PCA was asked by Eritrea and Yemen to decide the sovereignty of numerous islands, rocks, and undersea features in the Red Sea. In their decision of October, 1998 the PCA divided the contested Red Sea Islands into four groups and ruled on the sovereignty of each group individually. The court muddled through the convoluted historic colonial title and found tying the islands to a specific state inconclusive since treaties and *uti possidetis* alone could not decide island possession.[91]

a. The Mohabbakahs

The court rejected Yemeni and Eritrean arguments the islands were covered by treaty law and *uti possidetis*. Instead, the court decided the islands fell within the 12 nautical mile territorial seas of Eritrea, and ruled in favor of Eritrea.[92]

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[88] Ibid., 225–227.

[89] Ibid., 228–229.

[90] Ibid., 225–229.

[91] Barbara Kwiatkowska, "The Eritrea-Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation," *Ocean Development & International Law* 32 (2001): 3–7, (hereafter cited as "Eritrea v. Yemen, Landmark Progress").

[92] Ibid., 6; Eritrea v. Yemen, 1, 131–133, (Permanent Court of Arbitration 1998).

b. The Haycocks

Based on Eritrean arguments of pre and post-colonial effective control and Yemeni acquiescence, the court ruled the Haycock Islands fell under Eritrean sovereignty. Italy demonstrated pre-colonial effective control through the construction and maintenance of lighthouses. Eritrea demonstrated post-colonial effective control through the regulation of petroleum exploration. The court agreed that Yemen's failure to protest the well-publicized petroleum exploration agreements constituted Yemen's acquiesce.[93]

c. The Zuqar—Hanish Group

The court was unable decide the sovereignty of the islands based on title or succession, so the court turned to demonstrations of recent, post-colonial effective control. Although Eritrea provided examples of effective control, the court found Yemeni effective control more compelling. Yemen demonstrated effective control through the construction and maintenance of one lighthouse, construction of an air landing site for Yemeni sanctioned petroleum workers, and the licensing of tourist attractions on the islands.[94]

d. Jabal al-Tayr and the Zubayr Group of Islands

The court found scant evidence of treaty law or *uti possidetis* and immediately went to recent examples of effective control to decide sovereignty. The court agreed Yemen's promise to operate lighthouses on the islands in question as well as the regulation of petroleum exploration close to the islands constituted effective control.[95]

Once again the court found effective control the most compelling way of settling the sovereignty dispute in three out of the four island disputes. In the case of the Mohabbakahs, the geographic location within Eritrean territorial waters was determinative. Because the court recognized that territorial waters are the internationally

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[93] Kwiatkowska, "Eritrea v. Yemen, Landmark Progress," 7; *Eritrea v. Yemen*, 133–135.

[94] Kwiatkowska, "Eritrea v. Yemen, Landmark Progress," 7; *Eritrea v. Yemen*, 140–143.

[95] Kwiatkowska, "Eritrea v. Yemen, Landmark Progress," 7; *Eritrea v. Yemen*, 143–146.

recognized maritime boundaries of the state codified in UNCLOS and customary international law, the fair and equitable disposition of the islands should be to Eritrea. This also corresponds to Ethiopia's 1953 declaration it claimed and enforced sovereignty of its twelve nautical mile territorial sea.[96]

6. *Qatar v. Bahrain* (Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, 2001)

In 2001, the ICJ decided one disputed land and numerous maritime claims between Qatar and Bahrain. The sovereignty cases were decided by *uti possidetis* and effective control. This summary will focus on the legal arguments concerning the maritime features and not the disputed Zubarah territory on the Qatar Peninsula or the maritime delimitation.

a. The Hawar Islands

The ICJ ruled the disposition of the Hawar Islands was decided by the British Government in 1939 granting sovereignty to Bahrain. Although the Qatari government disagreed with the 1939 outcome, the court found no reason to contradict the British decision as it was a product of an arbitrative process. Since the British Government, the colonial power ruling Bahrain and Qatar at the time, settled this case, the sovereignty of the Hawar Islands was determined by *uti possidetis*.[97] As Brian Taylor Sumner's analysis revealed, the sequence on how the court decides a case is hierarchical. Sumner determined the ICJ examines treaty law, then *uti possidetis*, and finally effective control. In the case between Bahrain versus Qatar *uti possidetis* was immediately compelling (after reviewing treaty law) because the colonial ruler, Great Britain, arbitrated the same boundary dispute between Bahrain and Qatar in 1939. When Great Britain granted independence to Qatar and Bahrain in 1971, the 1939 decision was still binding and

[96] *Eritrea v. Yemen*, 8.

[97] Qatar v. Bahrain (Summary), 1, 168–169, (International Court of Justice 2001).

independence was based on the territorial holdings established during British colonial rule. Therefore, a ruling using effective control was not required.[98]

b. Janan Island

Similar to the Hawar Islands, the ICJ used *uti possidetis* to determine the sovereignty of Janan Island. In this instance, British colonial correspondence from 1947 stated Janan Island was not part of the Hawar Islands and therefore not part of the 1939 arbitration. The court concluded the British correspondence determined the island was Qatari.[99]

c. Fasht al Azm

The ICJ weighed whether Fasht al Azm was connected to Bahrain's Sitrah Island or an independent low-tide elevation separated from Sitrah Island. Bahrain argued Sitrah Island and Fasht al Azm were connected, however a 1982 dredging project created an artificial channel separating Sitrah Island and Fasht al Azm. If the court determined Fasht al Azm was part of Sitrah Island, the decision would increase the size of Bahrain's territorial sea and impact the delimitation of the maritime boundary in Bahrain's favor. However, if Fasht al Azm was ruled a low-tide elevation then the feature would be subject to the jurisdiction of which ever territorial sea it resided under (subject to the maritime delimitation verdict of the same case). In the end, the court determined Fasht al Azm was a low-tide elevation. The Court subsequently drew the maritime boundary between Bahrain and Qatar on top of Fasht al Azm thereby splitting the feature between both countries. This case goes on to show courts cannot rule on the sovereignty of low-tide elevations. This will become more relevant in the later discussion over the Scarborough Shoal and Spratly Islands.[100]

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[98] Sumner, "Territorial Disputes at the ICJ," 1804–1807; International Court of Justice, "Qatar v. Bahrain (Summary)," 168–169.

[99] *Qatar v. Bahrain* (Summary), 167–170.

[100] Ibid., 172; Qatar v. Bahrain, 4, 161–162 (International Court of Justice 2001).

d. Qit'at Jaradah

Although Qatar contends Qit'at Jaradah is a low tide elevation, Bahrain and the court's experts determined it was a rock subject to appropriation since it rose 0.4 meters above sea level at high tide. The court ruled Bahrain established effective control by constructing a navigational aid on the island.[101]

7. *Indonesia v. Malaysia* (Sovereignty over Pulau Ligitan and Pulau Sipadan, 2002)

In 2002 the ICJ ruled on the dispute between Indonesia and Malaysia over the two small islands, Pulau Ligitan and Pulau Sipadan. The court found the arguments of treaty law, and *uti possidetis* to be inconclusive. Indonesia's treaty law argument could not justify that the land border treaty between the United Kingdom and Netherlands applied over water. Both Indonesia and Malaysia argued they had historic titles based on colonial agreements with the local sultanates. Indonesia claimed the Netherlands Indies assumed possession of the islands from the Sultan of Bulungan. Malaysia claimed British North Borneo assumed possession of the islands from the Sultan of Sulu. Because the territories of both sultanates overlapped Pulau Ligitan and Pulau Sipadan, the court could not decisively reach a verdict using *uti possidetis*. The court was forced to turn to effective control to reach a decision.

In their argument for effective control, Indonesia claimed the waters surrounding the islands were patrolled by the navy and recognized by local fishermen as Indonesian. Yet the court rejected this argument based on two accounts. First, naval patrols near the islands are not conclusive demonstrations of effective control on land. Second, acts of private fishermen do not constitute the acts of the state. Instead, the court found Malaysia's demonstration of effective control more compelling. First, Malaysia's maintenance of lighthouses on both islands were clear evidence of effective control. Second, enforcement of Malaysia's Turtle Preservation Ordinance of 1917 demonstrated

[101] *Qatar v. Bahrain* (Summary), 172; *Qatar v. Bahrain*, 64.

effective governance of the islands. Therefore lighthouses and regulation of turtle egg collection decided the case in favor of Malaysia.[102]

8. *Nicaragua v. Colombia* (Territorial and Maritime Dispute, 2012)

In 2007, the ICJ decided the sovereignty of the San Andres, Providencia, and Santa Catalina Islands as part of a larger maritime dispute between Nicaragua and Colombia (which was ultimately decided in 2012). The court agreed the 1928 Treaty concerning Territorial Questions at Issue between Colombia and Nicaragua (henceforth referred to as the 1928 Treaty) unequivocally granted Colombia sovereignty over the maritime territories of the San Andres Archipelago. However, the 1928 Treaty failed to provide specific details on which islands comprised the San Andres Archipelago. This case brought out how the ambiguity of the treaty in determining specific islands led to the maritime dispute (this will be relevant when discussing the Senkaku Island case.) The court was asked to determine which maritime features constituted the San Andres Archipelago.[103]

In reviewing the case, the court found evidence of historical claims and *uti possidetis* inconclusive in determining sovereignty.[104] Therefore, the court was once again forced to turn to effective control to determine sovereignty. Demonstrations of effective control included regulation of commerce, construction and maintenance of lighthouses or naval outposts, law enforcement, naval patrol visits, and finally search and rescue operations. The court found these demonstrations of effective control compelling and awarded sovereignty to Colombia.[105]

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[102] Indonesia v. Malaysia (Summary), 1, 267–270, (International Court of Justice 2002); John G. Butcher, "The International Court of Justice and the Territorial Dispute between Indonesia and Malaysia in the Sulawesi Sea," *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 35, no. 2 (August 2013): 246–247.

[103] Nicaragua v. Colombia, 6, 26 (International Court of Justice 2007).

[104] Ibid.

[105] Ibid., 36–40.

9. *Nicaragua v. Honduras* (Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea, 2007)

In 200,7 the ICJ ruled on the sovereignty of four islands disputed by Nicaragua and Honduras in the Caribbean Sea. Initially, the court tried to decide the claims to the islands using *uti possidetis*. However Spain did not clearly bequeath the islands to either Nicaragua or Honduras. The court attempted to examine demonstrations of effective control during the colonial period before 1821, but was unable to reach a conclusion. Therefore the court considered arguments of effective control after the colonial period.

Before reviewing claims of effective control, the court set out to determine a critical date. This date considers all claims of effective control prior to the critical date. However, all claims after the critical date are seen as meaningless by the court since the parties are aware of the existence of a dispute and can engage in behavior to bolster their demonstration of effective control. In the case of the disputed islands, the court ruled the critical date (when both parties realized there was a dispute) took place on 21 March 2001 when Nicaragua requested in the Memorial to the court to decide the sovereignty of the islands. From Honduras's point of view, the 2001 Memorial this was the first time Nicaragua asserted a claim to the disputed islands. Nicaragua argued the question of the islands began in 1977 when correspondence regarding maritime delimitation was initially exchanged between both countries. Nicaragua argued the discussion of the maritime delimitation inherently implied the sovereignty of the disputed islands. The court supported Honduras's argument. Therefore relevant demonstrations of post-colonial effective control had to have taken place between independence in 1821 and 21 March 2001.

Honduras argued it maintained effective control over the islands by passing three constitutions and legislation which broadly mentioned the islands. (The legal instruments mention but do not specifically identify the four islands by name.) The court found that passing legislation without specifically mentioning the territories by name did not constitute effective control.[106]

[106] Nicaragua v. Honduras, 6, 58, (International Court of Justice 2007).

However, Honduras argued civil and criminal enforcement (including sanctioning a 1993 U.S. Drug Enforcement Administration Operation where U.S. surveillance aircraft were permitted to overfly the islands in question), immigration enforcement in the 1990s, fishing licensing in 1992, and authorization to build an antenna on Bobel Cay to support Honduran-approved oil exploration constituted effective control over the islands. (Honduras's effort to control the airspace over the island will become a relevant effective control argument when discussing China's East China Sea Air Defense Identification Zone.)[107]

Nicaragua failed to provide evidence of effective control. Instead, it rebutted most demonstrations of Honduran effective control occurred after what Nicaraguan authorities deemed as the critical date of 1977. Yet, even with the 156 year period between 1821 and 1977, Nicaragua failed to provide any compelling evidence of effective control. Therefore the court awarded the islands to Honduras based on effective control demonstrated in its post-colonial history.[108]

10. *Malaysia v. Singapore* (Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, 2008)

In May of 2008, the ICJ ruled in the sovereignty of Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge. The court granted sovereignty of Pedra Branca/Pulau Batu Puteh to Singapore and Middle Rocks to Malaysia. The court attempted to decide the case on *uti possidetis* by tracing the title of the disputed maritime territories to the Sultanate of Johor in 1512. The 1824 Anglo-Dutch Treaty divided the Sultanate of Johor into British and Dutch spheres of influence. During this time, the disputed maritime territories remained as part of the Sultanate of Johor. The court found Pedra Branca/Pulau Batu Puteh remained in Malaysian control until 1953 when diplomatic correspondence between the Colonial Secretary of Singapore and the Acting State Secretary of Johor disclosed Johor no longer claimed the island. This unambiguous

[107] Ibid., 49–67.

[108] Ibid., 72.

reply from Johor gave Singaporean officials legal confirmation that the Sultanate of Johor had abandoned its claim to the island.[109]

Once the court drew this conclusion, it looked to demonstrations of effective control to confirm Singaporean sovereignty and Malaysian acquiescence. In 1974 and 1978, Singapore regulated visits to Pedra Branca/Pulau Batu Puteh including the visits of Malaysian officials and vessels. The court ruled this was a clear demonstration of effective control and acquiescence of Malaysia. If Malaysia truly claimed the island, they would have vehemently protested asking permission to go to their own island.[110] Other demonstrations of effective control included the investigation of shipwrecks around the island, flying the Singapore flag over the Horsburgh lighthouse, installation of a naval relay antenna, and the proposed reclamation of land around Pedra Branca/Pulau Batu Puteh. All of these examples of effective control met no resistance by Malaysia and upheld Singapore's claim. The court rejected naval patrols as a form of effective control due to the proximity of both countries. The court also rejected Malaysia's claim it demonstrated effective control by regulating petroleum exploration. The court found the exploration agreement was ambiguous and did not publicly provide coordinates that would contest Singapore's claim.[111]

In this case the existence of a lighthouse alone was not an example of British/Singaporean effective control. This is because representatives of the British East India Company requested the lighthouse from the Sultanate of Johor. It is within legal norms for a lighthouse to be operated and maintained by one country on the shores of another country.[112]

As for the sovereignty of Middle Rocks and South Ledge, the court dismissed Singapore's argument that Middle Rocks and South Ledge are one comprehensive island group covered under the sovereignty of Pedra Branca/Pulau Batu Puteh. Since Singapore

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[109] Malaysia v. Singapore (Summary), 1, 9, (International Court of Justice 2008).

[110] Malaysia defended itself by saying the permission it sought was to visit the Singaporean lighthouse and not the Malaysian island but the court did not see it that way.

[111] *Malaysia v. Singapore* (Summary), 10–12.

[112] Ibid., 8.

offered no demonstrative legal argument other than proximity to Pedra Branca/Pulau Batu Puteh, Middle Rocks remained under Malaysian control. The court determined South Ledge was a low-tide elevation under the definition set forth by UNCLOS. Therefore, sovereignty rests within whichever territorial waters it is located. Since South Ledge falls under the overlapping territorial waters of both mainland Malaysia and Pedra Branca/Pulau Batu Puteh (Singapore), the court did not determine ownership.[113]

C. CASE ANALYSIS:

Why are so many maritime claims settled based on effective control? Nine out of ten cases support the assertion that effective control is the most determinative consideration in deciding maritime disputes. Therefore it is relevant to ask why this is the case. Why is treaty law and *uti possidetis* so inconclusive in settling maritime disputes?

1. Why Not Treaty Law?

Treaty law does not adequately cover maritime features for two reasons. First, "out of sight out of mind" matters for maritime features. Because the islands are remote and uninhabited, the sovereign/state forgets about the maritime features. Perhaps the maritime features were forgotten because they did not provide an economic incentive for incorporation into the state (or kingdom, or colony). It was difficult for ancient or colonial governments to administer uninhabited offshore territory. Water purification or food preservation technology did not exist for remote islands to maintain a human presence. The remote nature of these islands provided little economic incentive to exert historic effective control. It was not until the twentieth century that technological advances in offshore resource extraction (like petroleum) combined with UNCLOS's award of a 200 nautical mile exclusive economic zone gave barren islands immense value through natural resources.[114]

Second, because of the small and insignificant nature of the islands, treaties fail to accurately account for the islands. Maritime features are often ambiguously grouped

[113] Ibid., 12.

[114] Carlos Ramos-Mrosovsky, "International Law's Unhelpful Role in the Senkaku Islands," *University of Pennsylvania Journal of International Law* 29, no. 4 (2009): 906.

together, as was the case in *Colombia v. Honduras* where the San Andres Archipelago was not clearly defined. As observed in the *United States v. Netherlands* Island of Palmas case, specific locational data was unavailable to the colonial cartographers and treaty makers to identify the islands and tie it to a treaty. The court spent a considerable amount of effort to ensure evidence from both sides pertained to the Island of Palmas and not to other neighboring islands.[115]

2. Why Not *Uti Possidetis*?

History is messy and arguments for *uti possidetis* are directly affected by this. As was shown in all but one of the cases, the court found great difficulty in identifying a clear chain of title through the colonial period. In *France v. United Kingdom* (Minquiers and Ecrehos), the court could not clearly define a title dating back to the ninth century. In the case of *Eritrea v. Yemen*, the court was forced to maintain a title dating back to the King of Yemen, through rule by the Ottoman Empire, which was split into spheres of influence between Italy and the United Kingdom. Then the court had to determine which islands came with Eritrea when it split from Ethiopia. This was simply impossible to objectively rule on.[116] In the case of the *United States v. Netherlands*, the court recognized the United States was at a significant disadvantage since the arguments circulated around records and events that took place during Spanish colonial possession. The United States in turn had a difficult time proving *uti possidetis* and effective control during the colonial period.[117] As was seen in the El Tigre Island ruling from *El Salvador v. Honduras*, effective control during the colonial period and post-colonial period was the only way *uti possidetis* could be argued.

3. Why Effective Control?

In light of what the court is given to rule on, effective control often is easier to decide upon in contrast to treaty law and *uti possidetis*. First, the court can accept recent examples of effective control. This allows states to provide modern and well documented

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[115] *Netherlands v. United States*, 831, 852, 854, 859–862.

[116] *Eritrea v. Yemen*, 5-6.

[117] *Netherlands v. United States*, 831, 851–852.

evidence of effective control. For example, the U.S. Drug Enforcement Administration could clearly provide records that it had asked for permission to overfly Honduran islands in *Honduras v. Nicaragua*.

Second, as codified in the *Denmark v. Norway* case (Legal Status of Eastern Greenland), because of the remote and uninhabited nature of the islands, the courts accept low standards defining effective control. The court is forced to answer, what does effective control on remote islands look like? The text book example was El Salvador's case demonstrating state control and infrastructure on Meanguera Island (health care, postal service, infrastructure, law enforcement, etc.). El Salvador's examples of effective control could be considered strong since it can be argued the demonstrations of sovereignty were integrated into the daily life of the population of the island.

Yet, examples of weak effective control test the low bar established in the *Denmark v. Norway* case. For example, in the case of *Indonesia v. Malaysia* over Pulau Ligitan and Pulau Sipadan, the court used sporadic turtle egg collection enforcement as an example of effective control. In *Eritrea v. Yemen*, the promise of constructing and administering a lighthouse in diplomatic correspondence was sufficient to provide evidence of effective control. Honduras's authorization for the U.S. Drug Enforcement Agency to overfly the disputed islands in the *Nicaragua v. Honduras* provided an example of its intent to regulate the national airspace of the island. These examples of effective control are particularly weak since they do not demonstrate sovereign rule at a high frequency. Additionally, in the case of *Eritrea v. Yemen* and *Nicaragua v. Honduras*, a representative from the state never stepped foot on the island.

Third, demonstrations of effective control are easier to prove with evidence compared to interpretations of history and treaty law. A state either exerts effective control or it does not. In the case of *Eritrea v. Yemen*, the lighthouses on the Hanish Islands are either there or they are not. Tangible records of a criminal proceeding are presented to the court or they are not, as occurred in *France v. United Kingdom*. In the *United States v. Netherlands*, witness accounts from the Island of Palmas clearly state they saw the Dutch East India Company raise a flag when it landed.

4. The Negative Case (*Qatar v. Bahrain*)

In the ten case studies above, nine cases were ultimately decided by effective control. Only in the *Qatar v. Bahrain* verdict did the ICJ use *uti possidetis* to determine the sovereignty of the Hawar and Janan Islands. This negative case can be explained by four reasons. First, as Brian Taylor Sumner discussed, ICJ and PCA cases are generally decided through a process by first examining treaty law, then *uti possidetis*, and finally demonstrations of effective control. In this case there was available evidence to reach a verdict using the court's second test, *uti possidetis*.

Second, the British colonial period for both countries started later than in the other cases above. In this case, colonial administration occurred in the twentieth century after the fall of the Ottoman Empire. Therefore the colonial records were relatively recent compared to other examples of *uti possidetis*. The dispute over the islands existed for a comparatively brief period of history. By the time the court decided the case over the islands, only 62 years had elapsed between Great Britain's arbitrative ruling in 1939 and the ICJ's verdict in the 2001. In contrast, the case material for *France v. United Kingdom* spanned hundreds of years before it was reviewed by the court.

Third, the dispute was well documented by British colonial administrators. The correspondence from all three sides was available to the court. Fourth, the dispute covered islands which were relatively close to the shores of the claimants. All the disputed maritime territories were within twelve nautical miles of both claimants. It is hard to forget about these remote and uninhabited islands (or maritime features) when they are so close to the claimant states.

5. Implications for Chinese-disputed Maritime Territories

The analysis leads to an unsettling conclusion. Effective control being an overriding *sine que non* factor in deciding international maritime disputes may set a dangerous precedent. Sumner says it best when he states, "because it is a general principle of law, [effective control] might--in a worst case scenario--encourage territorial

imperialism and a new wave of colonialism."[118] Based on these trends, states have a greater incentive to exert effective control to demonstrate maritime claims. They can abuse this by using offensive force to seize islands in order to exert effective control. Alternatively, states would use force to defend islands in order to maintain territorial sovereignty. All claimants have a legal justification to demonstrate effective control even though the unintended consequences could escalate tensions. A system created to settle conflict may inadvertently provide an incentive for conflict.

Therefore, as Reinhard Drifte observes, challenges to a country's effective control promotes a country's case but also may escalate a maritime dispute into a conflict. Because ICJ and PCA verdicts favor effective control, states may aggressively assert or defend their sovereignty:[119] First, forcibly taking islands provides an opportunity for a claimant to demonstrate effective control. This was the case for China in the 1974 occupation of the Paracel islands. In 1974, China invaded the Paracel Islands wresting control of the islands from South Vietnam. The islands remain under Chinese *de facto* control to this day. It can be argued, the peaceful occupation of the islands (since 1974) has done more to strengthen China's legal claim through the continued and peaceful exertion of sovereignty.[120] Second, claimants are encouraged to violently defend disputed claims, as China did against Vietnam in the Johnson Reef Incident of 1988. In 1988, China killed 60 Vietnamese soldiers who were attempting to plant a flag on Johnson Reef.[121] Third, claimants are encouraged to enlarge their military garrisons on disputed maritime claims. This is done to reinforce the island's military presence as well as provide a legal example of effective control. In 2012, China increased its Woody Island garrison with additional military forces and can forward deploy fighter aircraft using the

[118] Sumner, "Territorial Disputes at the ICJ," 1810.

[119] Drifte, "The Senkaku/Diaoyu Islands Territorial Dispute," 49.

[120] Hiep, Le Hong, "Vietnam's Domestic-Foreign Policy Nexus: Doi Moi, Foreign Policy Reform, and Sino-Vietnamese Normalization," *Asian Politics and Policy* 5, no. 3 (2013): 398.

[121] Ibid.

small air base on the island.[122] Fourth, claimants are encouraged to conduct economic ventures on the islands.[123] State sanctioned economic ventures reinforce an effective control claim. Fifth, claimants are encouraged to build structures on disputed islands like Japan's construction of lighthouses on the Senkaku Islands. In 1978, Japanese nationalists constructed a lighthouse on Senkaku Island to demonstrate its claim to the island.[124] These actions strengthen one claimants' title and if uncontested, weaken or challenge the other claimant's title.

Despite the pessimistic outlook, facts reveal the trends in the PCA and ICJ tend not promote land grabs. Over the past 25 years, only one conflict escalated to war over an island. (The most recent conflict was the skirmish between Yemen and Eritrea over the Red Sea Islands in 1995. This island sovereignty dispute was ultimately resolved by the PCA in 1998. The last major war over an island was the Falkland Islands War which took place in 1982. Even the lesser known military skirmish in the Johnson Atoll described above took place in 1988.) Instead, in the same 25 year period, six ICJ or PCA cases were initiated and settled in the international court system. Therefore international law is utilized more frequently than military force.

D. CONCLUSION

In conclusion, this chapter analyzed ten maritime disputes settled in the PCA, PCIJ, and ICJ. Nine out of the ten cases revealed effective control was the most determinative factor in deciding maritime disputes (see Table 3). The courts initially analyzed treaty law and *uti possidetis*, but for one reason or another this was inconclusive. Instead, the courts reverted to using colonial and post-colonial examples of

[122] Fravel, M. Taylor, "Much Ado about the Sansha Garrison," August 23, 2012, http://taylorfravel.com/2012/08/much-ado-about-the-sansha-garrison/; *Xinhua*, "China Approves Military Garrison for Disputed Islands," *BBC News*, July 22, 2012, http://www.bbc.com/news/world-asia-china-18949941.

[123] Chris Brummitt, "Vietnam: Chinese Ships Ram Vessels near Oil Rig," Associated Press, May 7, 2014, http://bigstory.ap.org/article/vietnamese-official-vietnamese-ships-collide-chinese-ones-close-rig-disputed-sea.

[124] Zhongqi Pan, "Sino-Japanese Dispute over the Diaoyu/Senkaku Islands: The Pending Controversy from the Chinese Perspective," *Journal of Chinese Political Science* 12, no. 1 (2007): 74–76, (hereafter cited as "Diaoyu/Senkaku Islands: The Chinese Perspective").

effective control to reach a verdict. Treaty law was not determinative because often these small, desolate, unpopulated, and economically insignificant islands were forgotten or not mentioned in treaties. In some cases, the treaties broadly referenced the islands but failed to specifically identify islands. *Uti possidetis* was inconclusive because the courts were forced to wade through hundreds of years of title to reach a conclusion. This was difficult to do objectively. Effective control was the most determinative because it is often easier to define and prove, and the courts tolerate a low standard for its determination. Yet the problem with using effective control over all other legal arguments is that states can abuse this legal justification in the name of international law. Countries may be encouraged to act aggressively to create and defend effective control or to undermine and challenge another claimant's effective control. Therefore an institution designed to settle conflict may actually encourage it.

Effective control, is extraordinarily important in determining the legality of a disputed maritime claim. As will be demonstrated in the next chapter, the strength and weakness of China's effective control in the Senkaku Islands, the Paracel Islands, and Scarborough Shoal could determine the sovereignty of these cases. Additionally, the strength or weakness of their claim may determine how China exerts legal warfare, as will be discussed in Chapter IV.

Table 3. Maritime Disputes in the PCA, PCIJ, and ICJ

Date	Claimant	Claimant	Court	Name of Case	Who Won	Basis of Decision	Examples of Effective Control
1928	U.S.	Netherlands	PCA	*Island of Palmas*	Netherlands	Effective Control	1. Suzerain contracts with the local population; 2. Flag hoisting; 3. Taxation.
1933	Norway	Denmark	PCIJ	*Legal Status of Eastern Greenland*	Denmark	Effective Control	1. Diplomatic agreements mentioning Greenland (as a whole); 2. Hunting expeditions; 3. Scientific exploration; 4. Visitation permits
1953	France	United Kingdom	ICJ	*Minquiers and Ecrehos*	United Kingdom	Effective Control	1. Regulation of oyster fishing; 2. Criminal proceedings on the islands; 3. Taxation; 4. Real estate contracts
1992	El Salvador	Honduras	ICJ	*Land, Island, and Maritime Frontier Dispute*	Split	Effective Control	1. International diplomacy/international recognition; 2. Sale of the island; 3. Claimant returned the island to the other claimant; 4. Nomination of Justices of the Peace; 5. Military appointments; 6. Issued Licenses; 7. Held elections; 8. Taxation; 9. Conducted census; 10. Tracked births/deaths; 11. Registered land; 12. Civil and criminal proceedings on the islands; 13. Postal service; 14. Built infrastructure (electricity, schools); 15. Provided health care for the population; 16. Provided education.
1996	Eritrea	Yemen	PCA	*Red Sea Islands*	Split	Effective Control / Geography	1. Construction and maintenance of lighthouses; 2. Regulation of petroleum exploration. 3. Construction of an airstrip for Yemeni sanctioned petroleum workers; 4. Licensing tourist activities; 5. Promise and intent to operate a lighthouse.

Date	Claimant	Claimant	Court	Name of Case	Who Won	Basis of Decision	Examples of Effective Control
2001	Qatar	Bahrain	ICJ	*Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*	Split	*Uti Possidetis* / Effective Control	1. Construction of a navigational aid
2002	Indonesia	Malaysia	ICJ	*Sovereignty over Pulau Ligitan and Pulau Sipadan*	Malaysia	Effective Control	1. Construction and maintenance of lighthouses; 2. Regulation of turtle egg collection.
2007	Nicaragua	Colombia	ICJ	*Territorial and Maritime Dispute*	Split	Effective Control	1. Construction and maintenance of lighthouses; 2. Construction of naval outposts; 3. Law enforcement on the island; 4. Naval patrol visits; 5. Search and rescue operations.
2007	Nicaragua	Honduras	ICJ	*Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea*	Split	Effective Control	1. Civil and criminal law enforcement; 2. International recognition; 3. Immigration enforcement; 4. Fishing enforcement (with on island construction); 5. Oil exploration; 6. Public Works to support oil exploration.
2008	Malaysia	Singapore	ICJ	*Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge*	Split	Effective Control / *Uti Possidetis*	1. Regulation of foreign visits; 2. Investigation of shipwrecks around the islands; 3. Flying the Singapore flag; 4. Installation of a naval relay antenna; 5. Proposed land reclamation

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III. EXAMINING CHINA'S MARITIME DISPUTES: THE SENKAKU ISLANDS, PARACEL ISLANDS, AND SCARBOROUGH SHOAL

A. INTRODUCTION

The last chapter focused on international law and how international courts use examples of effective control to resolve maritime disputes. This chapter will focus on China's legal case for the Senkaku Islands, Paracel Islands, and Scarborough Shoal. It seeks to answer the initial research question: do China's maritime claims and behavior regarding the Senkaku Islands, Paracel Islands, and Scarborough Shoal have a sound basis in contemporary international law?

The strength or weakness of China's legal case can potentially drive its strategy and tactics in dealing with its maritime disputes. If China's claim to the Senkaku Islands (or any other disputed maritime territory) is weak, it may be more likely to resort to other legal methods (or unlawful methods) to contest Japan's control over the islands. Other legal methods may include legal actions or actions outside of the law that use a quasi-legal justification. If China's legal claim to the Nine Dash Line (and therefore the Paracel Islands and Scarborough Shoal) using customary international law is flawed, China may be more likely to use nuanced legal justifications to fortify its claim. Concurrently, if China's legal claim is strong, it may use unlawful measures to defend its claim. Competing claimants may use unlawful measures to dislodge China's occupation depending on the strength or weakness of China's legal claim. The next chapter will discuss China's use of international law to fortify its legal claims or to justify its actions.

1. Case Study Method

To answer the research question, this chapter uses the case study method to analyze the Senkaku Islands, Paracel Islands, and Scarborough Shoal disputes. Each case will examine the multiple legal factors justifying both side's legal claim to the maritime features. Using Brian Taylor Sumner's method of analysis, the legal factors will include treaty law, *uti possidetis*, and effective control. The intent is to analyze the cases as a

court would. This analysis is important to show that, despite the outward confidence China exhibits in its claim, its legal case surrounding two of the three maritime features is very tenuous. The only dispute in which China has a reasonable claim is the Paracel Islands because of clear demonstrations of effective control and brief acquiescence by Vietnam.

The first section of this chapter will cover the Senkaku Island dispute. It will show Japan's claim to the Senkaku Islands is stronger than the Chinese claim. The second section will cover the dispute over the Paracel Islands and Scarborough Shoal. This section will assess China's claim to the South China Sea and the Nine Dash Line using customary international law. Case analysis will show that although China's claim to the Paracel Islands is strong, its claim to the Scarborough Shoal is weak.

B. THE SENKAKU (DIAOYU) ISLAND DISPUTE

This section will examine the Senkaku Islands sovereignty dispute between Japan and China. It seeks to answer the question which state has a stronger claim.

1. Introduction

The Senkaku (Diaoyu) Islands are contested by China and Japan based on historic claims from both sides (See Figure 2). Tensions surrounding the islands have led to a war of rhetoric between Japan and the People's Republic of China. Although tensions rose in 2010 when the Japanese Coast Guard arrested a Chinese fisherman in the waters surrounding the Senkaku Islands, the dispute climaxed in 2012 when Japan nationalized the islands by purchasing them from a private Japanese citizen.[125] Since then both sides conducted air and maritime patrols around the islands. In 2013 China announced an Air Defense Identification Zone (ADIZ) over the East China Sea.[126] The air and maritime patrols increase the potential for miscalculation, escalation, and possible conflict. Both

[125] Reinhard Drifte, "The Senkaku/Diaoyu Islands Territorial Dispute Between Japan and China: Between the Materialization of the 'China Threat' and Japan 'Reversing the Outcome of World War II'?" *UNISCI Discussion Papers* 32 (May 2013): 10.

[126] Xinhua, "Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone," *Xinhua*, November 23, 2013, http://news.xinhuanet.com/english/china/2013-11/23/c_132911635.htm.

sides lay claim to the island, and both sides have conducted military shows of force in and around the islands. Although China and Japan present strong claims over the Senkaku (Diaoyu) Islands, Japan's claim is slightly more convincing. After a brief background and some definitions the first section will summarize the historic cases made by both sides. The second section will show how Japan's claim is stronger than China's claim based on demonstrations of Japanese effective control.

Figure 2. The Location of the Senkaku (Diaoyu) Islands[127]

2. Background

The Senkaku Islands are located approximately 90 nautical miles northeast of Taiwan, approximately 200 nautical miles east of mainland China, and approximately 90

[127] Matt Stiles, "The Role for the U.S. in the East China Sea Dispute," *National Public Radio*, January 13, 2013, http://www.npr.org/2013/01/30/170667524/reality-and-perception-on-the-containment-of-china.

nautical miles from the nearest Japanese Island of the Ryukyu Island chain.[128] Japan refers to the archipelago as the Senkaku Islands while the People's Republic of China refer to them as the Diaoyu Islands (the Chinese word means fishing platform). There are eight total maritime features; five are uninhabitable islets, and three are barren rocks.[129] In 1971, the UN Economic Commission for Asia and the Far East (ECAFE) released its findings of potential oil and natural gas in the vicinity of the Senkaku Islands.[130] This report combined with the oil shocks of the 1970s provided an economic and national security incentive for nations to control the Senkaku Islands and its hydrocarbon resources.

a. International Law

The last section provided a background on the Senkaku Islands, this brief section will establish two legal concepts relevant to this chapter.

(1) Basis for Sovereignty

In accordance with international law, sovereignty for new territory can be claimed by meeting two elements. The first element is the discovery of *terra nullius.* An individual, acting on behalf of the state can initiate a claim of *terra nullius* for that state. As discussed in the Chapter II, the second required element for sovereignty is the demonstration of effective control. Any case using effective control can also be reinforced through acquiescence.[131]

(2) Belligerent Occupation

Under international law and the 1945 United Nations Charter, if a state uses force to violate sovereignty and conquer territory, the takeover is considered belligerent

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[128] Ministry of Foreign Affairs (Japan), "The Senkaku Islands: Seeking Maritime Peace Based on Rule of Law, Not Force or Coercion," Ministry of Foreign Affairs—Japan, accessed February 12, 2014, http://www.mofa.go.jp/files/000018519.pdf.

[129] Han-yi Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims* (Baltimore, MD: School of Law University of Maryland, 1999), 10, (hereafter cited as *Senkaku Island Dispute - History and Analysis*).

[130] Ibid., 5.

[131] William R. Slomanson, *Fundamental Perspectives on International Law*, 5th ed. (Belmont, CA: Thomson Wadsworth, 2007), 268–269.

occupation and the conquering state is not recognized as the legitimate ruler of the territory. A country and the occupied population maintain sovereignty despite belligerent foreign occupation.[132] A relevant historic example is the Iraqi invasion of Kuwait from 1990 to 1991. When Saddam Hussein invaded Kuwait in August of 1990, the international community condemned the attack. Within international law the Iraqi occupation of Kuwait was seen as belligerent occupation and an international coalition was organized with the intent to liberate Kuwait. At the end of hostilities, the sovereignty of Kuwait was restored while Iraq retreated to its pre-war borders.

b. Japan's Claim

From the Japanese point of view, the islands were identified as *terra nullius* and "discovered" by Koga Tatsushiro who landed on the islands to carry out his business of "catching and exporting marine products."[133] He was attracted to the island due to the presence of albatross feathers and petitioned to lease the islands in 1885 from Okinawa Prefectural authorities. Several of Mr. Koga's petitions were denied because Japanese authorities questioned if it owned the islands. His petition was finally approved on 10 June 1895.[134] Over the years, Koga was granted a no-rent lease for 30 years. During that time he employed workers and developed the islands for habitation. After the 30 year lease ended, Japan rented and then sold the islands to Koga. Prior to World War II, the islands were left uninhabited because the cost of transportation was too great.[135]

In 1958, the US military used the islands for target practice and training. Because one of the islands that the military used was owned by the Koga family, the United States leased the island from the family. Afterwards, the Koga family sold their islands to the Kurihara family. One of the islands, Taisho-jima has remained state-owned land and belongs to the Ministry of Finance.

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132 Ibid., 271–273.

133 Shaw, *Senkaku Island Dispute - History and Analysis*, 30.

134 Ibid.

135 Ibid., 30–31.

Due to the controversy following China's claim to the islands, in 1972 Japan issued *The Basic View of the Ministry of Foreign Affairs on the Senkaku Islands*. This document represents Japan's official stance and legal justification supporting its claim to the Senkaku Islands. The view states the islands were *terra nullius* and were incorporated in 1895 through discovery occupation. A marker was placed by the government of Okinawa prefecture to establish this claim in 1895.[136] The Japanese also assert the islands were never part of Taiwan. Therefore, they were not included in Article 2 of the Treaty of Shimonoseki which ceded Taiwan and the adjacent islands to Japan.[137] Because, the islands were not included in the Treaty of Shimonoseki, the Cairo Declaration, or the 1951 San Francisco Treaty (the peace treaty between the United States and Japan that ended the state of war between both nations), Japan was not required to return the islands to the Republic of China at the conclusion of World War II.[138] In May of 1969, authorities from Okinawa erected a fixed concrete marker on the main island of Senkaku. The engraving established the island as part of the City of Ishigaki. The Republic of China protested this unilateral move.[139] In 1978, a Japanese right-wing political group, Nihon Seinensha (Japanese Youth Federation), built a lighthouse on Senkaku Island. By building a navigational aid, the group intended to legitimize the Japanese claim over the islands. This infuriated the PRC and led to Chinese protests. The situation was diffused in October of 1978, when the PRC and Japan signed the Treaty of Peace and Friendship (this treaty was the peace treaty between the PRC and Japan recognizing an end to World War II). At the time, both sides elected to shelve the dispute. In 1990, the lighthouse was renovated by Nihon Seinensha, instigating the ire of the

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136 Ibid., 22–28; Ministry of Foreign Affairs (Japan), "The Basic View of the Ministry of Foreign Affairs on the Senkaku Islands," *Ministry of Foreign Affairs - Japan*, May 8, 2013, http://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html, (hereafter cited as "The Basic View of the Ministry of Foreign Affairs on the Senkaku Islands").

137 Japan and China, *Treaty of Shimonoseki*, 1895, http://china.usc.edu/(X(1)A(0L6_PDHqzwEkAAAAODAxOTZmODctMzQ3NC00NzU4LWIwMTktODg4MGExYWU5NmJmwtMoL-JpteZje1FppTPY3x8IhnQ1)S(uuvvws45x25sj1ilcewwij55))/ShowArticle.aspx?articleID=405&AspxAutoDetectCookieSupport=1.

138 Ministry of Foreign Affairs (Japan), "The Basic View of the Ministry of Foreign Affairs on the Senkaku Islands."

139 Shaw, *Senkaku Island Dispute - History and Analysis*, 13–14.

Chinese again. On 9 February 2005, Japan placed the lighthouse under the protection of Japanese state control. The move was condemned by China.[140] The markers and navigational aids provide evidence of Japanese authority and effective control.

The islands were mentioned in early diplomatic correspondence between Japan and the Republic of China and support an argument of ROC acquiescence. In 1920, the Chinese Consul stationed in Nagasaki, wrote a letter of appreciation to Japanese fishermen for rescuing shipwrecked Taiwanese sailors who were stranded on the Senkaku Islands. In the letter, the Consul cites "[fishermen] were met with contrary winds and drifted to Wayo Island, Senkaku Islands, Yaeyama District, Okinawa Prefecture, Empire of Japan." To many historians, this letter is written evidence of China's acknowledgement that the Senkaku Islands were seen by the Chinese as Japanese owned and administered. The letter was written by a Republic of China Consul, in his official capacity of his duties.[141] This statement is similar to the acquiescence observed by the Ihlen Declaration in the *Norway v. Denmark* (Eastern Greenland*)* case. In 1968, workers from the Republic of China were found on the islands without passports or official Japanese permission. Japanese officials asked the workers to leave. The workers then applied for permission with Okinawan prefecture authorities and were granted access to their original worksite. During this diplomatic exchange, the Republic of China did not issue a protest or demarche over the sovereignty of the islands.[142] This is another example of ROC acquiescence. The PRC disputes any acquiescence argument stating the actions of the ROC do not represent the official stance of the PRC.

c. China's Claim

China's claim to the Senkaku Islands dates back to the Fourteenth Century. The Ryukyuan Kingdom was a tributary state of China in the Fourteenth Century. Chinese navigators used the Senkaku Islands as navigational aids to sail to Okinawa. Therefore, in this view, the Japanese claim that the islands were *terra nullius* is void. Furthermore,

140 Zhongqi Pan, "Diaoyu/Senkaku Islands: The Chinese Perspective," 74–76.

141 Ibid., 33.

142 Ibid., 34.

envoys indicated that Chinese navigators felt they had reached foreign islands well after navigating past the Senkaku Islands. Sailors conducted ceremonial and sacrificial rituals indicating increased tension and uncertainty because of departing home waters.[143] Sailors from the eighteenth century noted that the color of the sea changed from blue to black when crossing into foreign waters after passing the Senkaku Islands. The Chinese sailors even named the area between the Ryukyu Islands as "Black Water Trough." Modern day oceanographers have noted that this change in water color is caused by moving from 200 meters of depth to over 2,000 meters into what is known today as the Okinawa Trough.[144]

A noted Japanese map maker from the Edo period colored the islands as belonging to Taiwan. His basis for the coloring was centered on Chinese envoy reports and give further evidence that the Japanese were aware of the Chinese boundary between Taiwan and the Ryukyu Islands; therefore the islands were not *terra nullius*.[145] China also contends Japan opportunistically cites map evidence from one particular map maker when his work supports Japan's claim yet dismiss work from the same map maker when his work does not support Japan's claim. Therefore, it is illogical for Japan to dismiss the map maker's contradictory evidence in the Senkaku dispute.[146]

Evidence of Chinese on-island effective control is hard to come by. To provide evidence of effective control, China argues that Fourteenth and Sixteenth century Chinese sailors conducted counter-piracy and naval patrols around the islands, as the islands were incorporated into the Chinese coastal defense system.[147] However, further primary source evidence showing on-island effective control is simply not available. Instead, the PRC contends customary international law reflects Imperial China was the regionally and historically accepted ruler of the East China Sea (and South China Sea). This Sino-centric

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143 Shaw, *Senkaku Island Dispute - History and Analysis*, 42–45.

144 Ibid., 49–51; People's Republic of China, "Diaoyu Dao, an Inherent Territory of China" (State Council Information Office, September 2012), http://news.xinhuanet.com/english/china/2012-09/25/c_131872152.htm.

145 Shaw, *Senkaku Island Dispute - History and Analysis*, 52–53.

146 Ibid., 55.

147 Ibid., 55–56; People's Republic of China, "Diaoyu Dao, an Inherent Territory of China."

world view perceives that China was the middle kingdom of the world and all other foreign cultures should pay tribute to China and adopt Chinese culture as the defining world order. Because of this Sino-centric view of the world, according to the Chinese view, the relevance of effective control is superseded by the customary norm in the region. Primary sources written during the time of Imperial China would naturally reflect a Sino-centric world view and do not incorporate the Western European world view that requires the establishment of effective control, sovereignty, and borders. While there are no primary sources showing on-island effective control over the Senkaku Islands this is a moot point since customary international law demonstrates Imperial China was the historically and regionally accepted ruler of the region.[148]

In its white paper on the Senkaku/Diaoyu dispute, the PRC contends the Senkaku Islands are part of the larger island of Taiwan. China was forced to cede control of Taiwan and the neighboring islands (to include the Senkaku Islands) to Japan in the "unequal" 1895 Treaty of Shimonoseki.[149] This treaty between Imperial China and Japan ended the First Sino-Japanese War (1894-1895). China contends that the Treaty of Shimonoseki began the belligerent occupation of the Senkaku Islands. Based on the belligerent occupation, the Republic of China attested that the islands should have returned to Chinese control in accordance with the 1943 Cairo Declaration, the 1945 Potsdam Declaration, and the 1953 Peace Treaty between the ROC and Japan. (Both declarations established the territorial claims and expectations among the victorious powers in the post-World War II era.)[150]

China's white paper also contends the islands were briefly returned to Chinese control as part of the return of Taiwan but backroom deals and secret consultations between Japan and the United States generated a conspiracy to steal the Senkaku Islands from China. The PRC protested the San Francisco Treaty of 1951, the peace treaty between the United States and Japan. In 1971 the United States and Japan signed the

148 Shaw, *Senkaku Island Dispute - History and Analysis*, 64–66.

149 People's Republic of China, "Diaoyu Dao, an Inherent Territory of China."

150 Ministry of Foreign Affairs (People's Republic of China), accessed 12 February 2014, http://www.fmprc.gov.cn/eng/topics/diaodao/; Ibid.

Ryukyu Reversion Agreement. This agreement returned the Ryukyu Island chain to Japanese sovereignty. Included in the agreement were the Senkaku Islands. The PRC protested this agreement too, yet it should be noted, the United States did not recognize the sovereignty of the PRC until 1979. Therefore PRC protests at the time were ignored. PRC protests are relevant because they demonstrate consistent defiance to Japan's claim, preventing any argument of Chinese acquiescence.[151]

d. Japan's Response to China's Claim:

Japan responded to China's Senkaku white paper, "Diaoyu Dao, an Inherent Territory of China," on its Ministry of Foreign Affairs webpage. The Japanese government webpage refutes China's legal assertions.[152] First, Japan contends the Senkaku Islands are separate from Taiwan and not part of the Cairo Declaration. Both the Cairo Declaration and Potsdam Declaration do not specifically mention the Senkaku Islands by name or location. Second, "The Basic View" argues both the ROC and PRC failed to protest the incorporation of the islands in Article III of the San Francisco Treaty. In the treaty, the United States was given administration of the Ryukyu Islands via a latitude and longitude. Both the ROC and PRC acquiesced to Japan's claim by failing to protest U.S. custody of the islands.[153] Third, China's argument that the islands were Chinese owned is based on assumptions or implied in documents. China cannot produce any documents stating the islands were explicitly Chinese owned. In this third point, Japan contends China fails to produce concrete evidence the Chinese government or imperial predecessors exerted any on-island effective control. If China truly claimed the islands prior to 1895, it made no attempt to occupy or exert effective control on the islands. Japan also argues conducting counter piracy patrols does not constitute effective control of the islands in accordance with international law.[154] Finally, the ROC did not

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151 Ibid.; Pan, "Diaoyu/Senkaku Islands: The Chinese Perspective," 79.

152 Ministry of Foreign Affairs (Japan), "Senkaku Island Q&A," *Ministry of Foreign Affairs - Japan*, June 5, 2013, http://www.mofa.go.jp/region/asia-paci/senkaku/qa_1010.html.

153 Ministry of Foreign Affairs (Japan), "The Basic View of the Ministry of Foreign Affairs on the Senkaku Islands."

154 Shaw, *Senkaku Island Dispute - History and Analysis*, 47.

protest the 1971 *Ryukyu and Daito Island Reversion Agreement* returning sovereignty of the islands from the United States back to Japan.[155]

e. China's Rebuttal to Japan's Claim:

In reaction to Japan's case, China's white paper on the Senkaku Islands challenges Japan's "Basic View" by lodging four counter arguments to Japan's claims. First, Koga Tatsushiro's petition to lease the island was only approved on 10 June 1895, six days after Japan had occupied Taiwan. Japan only approved Koga's ownership request because it held a legal claim to Taiwan and the islands surrounding Taiwan. Second, the islands were part of Taiwanese territory and therefore subject to the Treaty of Shimonoseki. Therefore Japan should have relinquished all claims to the island at the conclusion of World War II. Third, despite Japan's insistence that the islands were never occupied by the Chinese, due to the remote and inhospitable nature of the islands, it would be impossible for Chinese to occupy the islands. Prior to 1895, technology for bulk water storage and water distillation did not exist. Finally, the PRC consistently disputed Japan's claim to the Senkaku Islands in the San Francisco Treaty and the Ryukyu Reversion agreement and therefore never acquiesced to Japan's claim.[156]

f. Applying Sumner's Methodology

By analyzing treaty law, *uti possidetis*, and effective control, a legal case would most likely favor Japan's claim to the islands.[157] Analyzing treaty law alone would be inconclusive. There is no conclusive proof the Treaty of Shimonoseki, the Cairo Declaration, or the 1951 San Francisco Treaty clearly incorporates the Senkaku Islands. In examining the *Nicaragua v. Colombia* case, treaty specificity matters. In *Nicaragua v. Colombia* the court unanimously agreed the San Andres Archipelago belonged to Colombia. However the treaty did not mention by name or location, which maritime features were included in the San Andres Archipelago. Similarly, the court would

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[155] Ministry of Foreign Affairs (Japan), "Senkaku Island Q&A."

[156] People's Republic of China, "Diaoyu Dao, an Inherent Territory of China"; Shaw, *Senkaku Island Dispute - History and Analysis*, 112–122.

[157] Sumner, "Territorial Disputes at the ICJ," 1803–1804.

unanimously agree Japan was required to relinquish its territories taken via conflict in accordance with the Cairo Declaration and the San Francisco Treaty. The Cairo Declaration states:

> It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa (Taiwan), and the Pescadores, shall be restored to the Republic of China.[158]

However, without exact locations or specific mention of the Senkaku Islands, the court would not be able to draw a conclusion using treaty law. The declaration unambiguously mentions Manchuria, Formosa (Taiwan), and the Pescadores yet it does not mention the Senkaku Islands by name. China would likely argue that the Senkaku Islands are included in the geography of Formosa (Taiwan). However, Japan would reiterate that if the declaration mentioned the Pescadores (which are closer to Formosa and the Chinese mainland) the treaty should have also mentioned the Senkaku Islands (which are further and smaller than the Pescadores). The Japanese argument would conclude that failure to mention the Senkaku Islands means the Cairo Declaration did not intend to cover the Senkaku Islands. Furthermore, Japanese control began prior to the First World War, therefore the Senkaku Islands would not qualify based on the time frame designated in the Cairo Declaration.

Using *uti possidetis* to determine sovereignty would be irrelevant because the islands were never under any colonial rule. Therefore the court would look to demonstrations of effective control. China would argue its demonstrations of effective control included anti-piracy patrols in the vicinity of the islands, as well as navigators using the islands as a navigation point. However, as demonstrated in *Indonesia v. Malaysia* and *Nicaragua v. Honduras*, naval patrols around the islands do not constitute effective control on the island. Therefore China's demonstration of effective control would be unsubstantiated. China could also argue a case for belligerent occupation. Since signing the Treaty of Shimonoseki, China had no alternative but to accede to Japanese *de*

158 Franklin D. Roosevelt, Chiang Kai-shek, and Winston Churchill, "Cairo Declaration," December 1, 1943, http://www.ndl.go.jp/constitution/e/shiryo/01/002_46/002_46tx.html.

facto rule. However, (according to Japan's assertion) such a claim would prove difficult, given that during the period between 1949 and 1971, the PRC failed to contest Japan's claim to the islands. The PRC disputes it ever acquiesced during this time frame by stating it consistently protested the San Francisco Treaty and the Ryukyu Reversion Agreement. To address this question a court will have to distinguish if protests lodged by the PRC before the PRC was recognized by the United Nations constituted legitimate protests of a state. This topic alone will be highly contentious and the court may not rule on this argument.

Japan's demonstrations of effective control are overwhelming. First, Japanese intent to grant Koga Tatsushiro a permit to extract resources, and later to lease, and sell the islands to him is an initial demonstration to act as a sovereign. Second, the local Okinawan government placed a sovereignty marker on Senkaku Island in 1895 and 1969 to establish its claim. Third, in 1968 Japan enforced immigration law on workers on the islands from the Republic of China. As observed in *Nicaragua v. Honduras* and *Malaysia v. Singapore*, immigration and visitor control is additional evidence that Japanese jurisdiction covered the islands. Fourth, Japan conducted diplomacy regarding the islands by ensuring the 1971 Ryukyu Reversion Agreement included the Senkaku Islands. As observed in the *El Salvador v. Honduras* case, negotiating bilateral treaties covering the disputed territory is an example of Japan acting as a sovereign. Supporting this argument is the intent of the United States to return the Ryukyu Islands (including the Senkaku Islands) to Japan. This is not unlike how the United Kingdom returned El Tigre Island to Honduras after taking possession of the island to repay debts in the *El Salvador v. Honduras* case. Fifth, placing the Senkaku lighthouse under state control is another demonstration of effective control. Initially the construction of the lighthouse could be dismissed as the unsanctioned actions of private citizens. However, effective control was exerted when the lighthouse passed from the hands of private citizens to the control of the state. State run lighthouses are reoccurring examples of effective control as seen in *Eritrea v. Yemen*, *Indonesia v. Malaysia*, and *Nicaragua v. Colombia*.

Finally, the 2012 nationalization of the Senkaku Islands was a major example of effective control. When discussing the background on the islands above, the government

of Japan sold the islands to the Koga family. Over time, the Koga family sold the islands to the Kurihara family. In 2013, the lease was to expire and the nationalistic Tokyo Governor Ishihara Shintaro announced his intention to purchase the islands from the Kurihara family. Fearing the actions of a nationalist politician could inflame Sino-Japanese relations, Prime Minister Noda purchased the islands on behalf of the Government of Japan. Although this move was probably the lesser of two evils, the purchase upset Sino-Japanese relations and enflamed anti-Japanese nationalism in China. In terms of effective control, the nationalization was a clear demonstration of effective control.[159]

Chinese acquiescence is evident in two examples. First, the 1920 letter of appreciation from the Chinese Consul in Nagasaki provided evidence that China recognized Japan's sovereignty over the island. (However, it could be argued, unlike the Ihlen Declaration and the *Norway v. Denmark* case, this Consul was not the Chinese foreign minister.) Second, in 1968, the Republic of China did not protest the Japanese deportation of Taiwanese workers on the islands. If the Republic of China truly claimed the islands they would have vehemently protested Japan's unjustified immigration enforcement. It should be noted ROC acquiescence does not equate to PRC acquiescence. It is also suspect that a Chinese protest finally emerged the same year the findings of the Economic Commission for Asia and the Far East (ECAFE) were released in 1971.[160]

If the case went to an international court, China would probably use a belligerent occupation argument to refute all Japanese demonstrations of effective control. However, in order for belligerent occupation to apply, China would need to demonstrate it maintained effective control before Koga Tatsushiro arrived on the islands in 1885. In examining China's White Paper on the Senkaku Islands, the historic claim does not detail any on-island effective control. Chinese sailors may have identified the island and used it for navigation, its fishermen may have fished in the waters adjacent to the island,

[159] Drifte, "Senkaku/Diaoyu Dispute," 35–37.

[160] Tadashi Ikeda, "Getting Senkaku History Right," *The Diplomat*, November 26, 2013, http://thediplomat.com/2013/11/getting-senkaku-history-right/.

however this does not equate to on-island effective control. Therefore belligerent occupation would not apply in this particular case.[161]

g. Conclusion

In conclusion, both Japan and China provided well-balanced arguments to claim the Senkaku Islands. However, based on demonstrations of effective control, the Japanese claim to the Senkaku Islands is well substantiated. Japan demonstrated effective control through the lease and sale of the island, regulated immigration, concluded diplomacy over the islands, and operated a lighthouse on the largest island. China also acquiesced its claim by failing to pretest the deportation of Taiwanese workers on the island and failing to protest continued Japanese administration of the islands immediately after World War II.

C. THE PARACEL ISLANDS AND THE SCARBOROUGH SHOAL

This section will examine the sovereignty of the Paracel Islands and the Scarborough Shoal. It seeks to answer the question which state has a stronger claim. Both maritime features are discussed together in this section because of their location within China's Nine Dash Line. Yet one of the most fundamental difference between the two disputes is the fact that the Paracel Islands are an archipelago of habitable islets whereas the Scarborough Shoal is a low-tide elevation with a rock. This fundamental difference affects how states demonstrate effective control on either feature.

1. Introduction

The previous section of this chapter built a legal case supporting Japan's claim to the Senkaku Islands. This section will focus on the legal case concerning China's claim to the Paracel Islands and the Scarborough Shoal. The reason why this section combines these two cases is because the Paracel Islands and Scarborough Shoal fall within the Chinese-claimed "Nine Dash Line." The legal justifications China uses to build its case for both maritime features are virtually identical. Likewise, the legal arguments against

[161] People's Republic of China, "Diaoyu Dao, an Inherent Territory of China."

China's Nine Dash Line can be used against both features. In an effort to prevent repetition, this section will combine the arguments for and against the Nine Dash Line in this section. The chapter will then distill the cases for the Paracel Islands and Scarborough Shoal separately from the Nine Dash Line.

This chapter will show that the Chinese legal justification for the Nine Dash Line is flawed. When the claims to the Paracel Islands and the Scarborough Shoal are argued separately from the Nine Dash Line, China has a strong case for the Paracel Islands and a weak case for the Scarborough Shoal. To reach this conclusion, this section will first provide a background on the Paracel Islands and the Scarborough Shoal. Second, it will provide a background on the Nine Dash Line. Third, it will assess the validity of the Nine Dash Line in international law. Fourth, this section will demonstrate why China presents a strong legal case supporting its claim to the Paracel Islands. The fifth and final section will show why China's case for the Scarborough Shoal is flawed.

2. Background of the Maritime Territories

This section will briefly discus the background history of both disputed maritime claims and the Nine Dash Line. Both the Paracel Islands and the Scarborough Shoal reside within the Nine Dash Line (See Figure 3).

Figure 3. The South China Sea/Nine Dash Line and disputed maritime territories[162]

a. Paracel Islands

The Paracel Islands are an archipelago of small islets approximately 180 nautical miles from both Vietnam and China. The Chinese refer to the islands as the *Xisha* Islands. In Vietnamese, the archipelago is known as the *Hoang Sa*. Both China and Vietnam trace their ownership of the islands back to the 14th century. The islands were a navigational point when transiting between the Chinese empire and the Vietnamese kingdom. In 1974, the PRC forcefully seized control of the Paracel Islands from South Vietnam as the United States was withdrawing from Vietnam and when South Vietnam was militarily weak. About a year later, South Vietnam did not exist and the newly unified nation of Vietnam was militarily too weak to retake the Paracel islands.[163] The islands have remained in Chinese *de facto* control ever since. China constructed an

[162] BBC, "Philippines 'to Take South China Sea Row to Court,'" *BBC News Asia*, January 22, 2013, http://www.bbc.com/news/world-asia-21137144.

[163] Thomas M. Kane, *Chinese Grand Strategy and Maritime Power* (Portland, OR: Frank Cass, 2002), 69.

airstrip on Woody Island and based fighters there. The strategic location of the base allows China to extend the range of fighter patrols over the South China Sea.[164] Since 1999, China has unilaterally imposed an annual foreign fishing ban in the South China Sea from June to July, routinely infuriating Vietnam.[165]

b. Scarborough Shoal

The Scarborough Shoal is located 122 nautical miles west of the main Philippine Island of Luzon. The shoal is an enclosed triangle-shaped reef with a narrow channel leading to an inner lagoon. Most of the shoal is submerged. The tallest point of the shoal is South Rock, which rises 1.8 meters above the water at high tide.[166] In Chinese Scarborough Shoal is called *Huangyan* Island. The Philippines refer to the shoal as *Bajo de Masinloc*. As early as 1935, China maintained the reef as part of the Zhongsha Islands (Maccesfield Bank). Historic Chinese documents and laws mentioned the island formation by name. The shoal lies within the Chinese Nine Dash Line. The Scarborough Shoal became a maritime dispute when, in 1997, the Philippine Navy prevented Chinese fishing vessels from approaching the shoal.[167] In June of 2012, tensions escalated when the Philippine naval vessel BRP (*Bapor ng Republika ng Pilipinas* the prefix for Philippine navy ships) *Gregorio del Pilar* attempted to apprehend Chinese fishermen collecting marine life in the shoal. Before the Philippine Navy could arrest the fishermen, two Chinese maritime surveillance vessels arrived on scene and prevented the BRP *Gregorio del Pilar* from approaching the fishermen. The Chinese vessels radioed the BRP *Gregorio del Pilar* informing the crew that they had ventured into Chinese territorial waters. Since the June 2012 incident, Chinese Coast Guard vessels have maintained a continual presence around the shoal. Diplomatically, China and the Philippines were unsuccessful in their attempts to resolve the dispute. In January of 2013,

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164 Bernard D. Cole, *The Great Wall at Sea: China's Navy in the Twenty-First Century*, Second (Annapolis, MD: Naval Institute Press, 2010), 46.

165 Tran Troung Thuy, "The Declaration on the Conduct of Parties in the South China Sea and Developing Maritime Energy Resources," *National Bureau of Asian Research* 2011, no. 35 (2011): 184.

166 Zou Keyuan, "Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?," *IBRU Boundary and Security Bulletin* 7, no. 2 (1999): 71, (hereafter cited as "Scarborough Reef: New Flashpoint").

167 Ibid.

the Philippines submitted the case to the International Tribunal for the Law of the Sea. About a month later, The PRC replied to the Philippines's in a *note verbale* stating it would not accept the arbitration. As of December, 2014, the case remains open and undecided.[168]

c. Background of the Nine Dash Line

Although scholars and legal experts debate the true meaning of the Nine Dash Line (also referred to as the "U-shaped line"), in general it is China's claim to most of the South China Sea. The Nine Dash Line originally appeared as eleven dashed lines in 1935 as part of a publication from the Republic of China (ROC). The "Map of Chinese Islands in the South China Sea" was a Kuomintang representation of the ROC's claimed insular features.[169] After 1949, The PRC inherited the ROC's position on the islands. The PRC reiterated its claim with the Declaration on China's Territorial Sea of September 9, 1958.[170] The controversy surrounding the Nine Dash Line map gained international attention when it was, attached to a series of Chinese *note verbales* responding to Malaysia's and Vietnam's 2009 submission to the UN Commission on the Limits of the Continental Shelf. Up to this point, international awareness to the extent of China's claim was not well known. The *note verbales* contested Malaysia's and Vietnam's conflicting claims to the South China Sea.[171] Many questions arise surrounding the Nine Dash Line

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[168] Renato Cruz De Castro, *China's Realpolitik Approach in the South China Sea Dispute: The Case of the 2012 Scarborough Shoal Standoff*, Managing Tensions in the South China Sea (Washington, DC: Center for Strategic & International Studies, June 5, 2013), 2–3, http://csis.org/files/attachments/130606_DeCastro_ConferencePaper.pdf; Department of Foreign Affairs (Philippines), "Philippine Position on Bajo de Masinloc (Scarborough Shoal) and the Waters Within Its Vicinity," *Department of Foreign Affairs (Philippines)*, April 18, 2012, http://www.gov.ph/2012/04/18/philippine-position-on-bajo-de-masinloc-and-the-waters-within-its-vicinity/.

[169] Masahiro Miyoshi, "China's 'U-Shaped Line' Claim in the South China Sea: Any Validity under International Law?" *Ocean Development & International Law* 43, no. 2012 (2012): 3, (hereafter cited as "China's U-Shaped Line"); Zhiguo Gao and Bing Bing Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications," *The American Journal of International Law* 107 (2013): 58, (hereafter cited as "Nine-Dash Line in the SCS").

[170] Florian Dupuy and Pierre-Marie Dupuy, "A Legal Analysis of China's Historic Rights Claim in the South China Sea," *The American Journal of International Law* 107 (2013): 126, (hereafter cited as "China's Historic Rights in the SCS").

[171] Ibid., 126–127; Permanent Mission of the People's Republic of China to the United Nations, "*Note Verbale* (7 May 2009)," Note Verbale, (May 7, 2009).

map. If the Nine Dash Line map is a visual representation of what China claims, what does the dashed line mean? Is the dashed line a boundary? Do the lines represent China's EEZ? What is China's justification for its claim? The ambiguity of the line has produced much debate among scholars and (non-PRC) diplomats.

The PRC has codified its claim to the Nine Dash Line in its passage of domestic laws and reinforced it in international statements. The PRC vaguely reiterated its claim with the Declaration on China's Territorial Sea of September 9, 1958 (henceforth referred to as the 1958 Declaration). This document refers to Penghu Islands, the Tungsha Islands (or Dongsha Islands aka. Pratas Islands), Hsisha Islands (or Xisha Islands aka. Paracel Islands), the Chungsha Islands (Zhongsha Islands aka. Macclesfield Bank), the Nansha Islands (Spratly Islands) by name, then states that China owns "all other islands belonging to China."[172]

China passed its 1992 Law on the Territorial Sea and the Contiguous Zone (henceforth referred to as the 1992 Law), reaffirming its claim to the South China Sea islands. Interestingly, this document adds a reference to Diaoyu Island (Senkaku Islands) but drops mention of the Zhongsha Islands. Just like the 1958 Declaration, the 1992 Law left the catch all phrase "all other islands that belong to the People's Republic of China."[173]

When the PRC ratified UNCLOS on 7 June 1996, it added a declaration that referenced the 1992 Law as an articulation of China's maritime territorial claims.[174] The 7 May 2009 *note verbale* presented the Nine Dash Line map with its ambiguous statement:

> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over

[172] People's Republic of China, "Declaration of the Government of the People's Republic of China on China's Territorial Sea" (People's Republic of China, September 4, 1958) from Stefan Talmon and Jia, Bing Bing, eds., *The South China Sea Arbitration: A Chinese Perspective* (Portland, OR: Hart Publishing, 2014).

[173] People's Republic of China, "Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone," February 25, 1992 from Talmon and Jia, Bing Bing, *The South China Sea Arbitration: A Chinese Perspective*.

[174] United Nations, "UNCLOS."

> the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese Government, and is widely known by the international community.[175]

The phrase "see attached map" indicated the map equated to China's claim and somehow implied a corresponding justification. "See attached map," did nothing for China's case except to create doubt and questions. The 14 April 2011 *note verbale* revealed that the Nine Dash Line is based on "abundant historical and legal evidence," alluding to a customary international law argument.[176] Yet, scholars, diplomats, and legal experts are forced to interpret China's vague claim to the South China Sea.[177]

3. Analyzing the Validity of the Nine Dash Line in International Law

An overwhelming majority of western scholars and legal experts attack the Nine Dash Line based for four reasons. First, the Nine Dash Line claim is ambiguous. Second, maps do not significantly contribute to verdicts rendered by the ICJ or PCA. Third, China's claim using customary international law is flawed and based on a Sino-centric view of the world. Fourth, effective control during the Imperial Chinese period does not meet the legal standard of effective control.

Western scholars and Chinese scholars draw diametrically opposed conclusions on the strength of the Nine Dash Line as a legal argument. Western scholars refute the Nine Dash Line is a legal argument. Chinese scholars argue the Nine Dash Line represents a historic claim to the South China Sea. This section will analyze the validity of the Nine Dash Line as a legal argument.

a. The Ambiguity of the Nine Dash Line

Many western legal scholars criticize the Nine Dash Line for its ambiguous meaning. No Chinese document provides clarity on what the nine dashes mean. Therefore

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[175] Permanent Mission of the People's Republic of China to the United Nations, "Note Verbale (7 May 2009)."

[176] Permanent Mission of the People's Republic of China to the United Nations, "Note Verbale (14 April 2011)," Note Verbale, (April 14, 2011).

[177] Robert Beckman, "The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea," *The American Journal of International Law* 107, no. 142 (2013): 154.

scholars on both sides of the debate are forced to interpret China's meaning. Non-Chinese scholars have come up with five possible interpretations of what the Nine Dash Line means.

First, the line could be an illustration of China's continental shelf. The *note verbale* and map was submitted in reaction to Malaysia's and Vietnam's claim to their continental shelves. Although the map closely follows the 200 meter isobath, the Chinese government has failed to define the line.[178] The map fails to provide accompanying hydrographic evidence to this justification like depth markings or hydrographic contour lines.[179] Second, it could depict the extent of China's exclusive economic zone. However, many insular features within the Nine Dash Line require interpretation of whether they are islands, rocks, or low-tide elevations.[180] The map and *note verbale* do nothing to clarify this important legal point.

Third, it could represent a declaratory line where everything contained inside the dashes is Chinese territory. If this is the case, why use dashes? Solid lines are the internationally recognized symbol of a territorial claim and China is a member of the International Hydrographic Organization. This organization established internationally recognized standards for drafting maps and charts. A dotted line is not a standard means of identifying a cartographic feature like a boundary or continental shelf. Additionally, if this is some sort of boundary, where are the coordinates that mariners and aviators could use to stay out of Chinese waters?[181]

Fourth, the dashed line is drawn on such a small scale, its detail cannot be interpreted.[182] Finally, the line could represent nothing more than historic Chinese patrols, merchant routes, or fishing grounds. The *note verbale* implies the map

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178 Erik Franckx and Marco Benatar, "Dots and Lines in the South China Sea: Insights from the Law of Map Evidence," *Asian Journal of International Law* 2 (2012): 109–110, doi:10.1017/S2044251311000117, (hereafter cited as "Dots and Lines").

179 Dupuy and Dupuy, "China's Historic Rights in the SCS," 131–132.

180 Franckx and Benatar, "Dots and Lines," 100–103.

181 Ibid., 106–111. Hong Nong, "Interpreting the U-Shape Line in the South China Sea," *China US Focus*, May 15, 2012, http://www.chinausfocus.com/peace-security/interpreting-the-u-shape-line-in-the-south-china-sea/.

182 Franckx and Benatar, "Dots and Lines," 110.

demonstrates some link to history. Yet, viewing maps and reading the *note verbale* does not reveal a clear historic argument. There are no annotations or allusions to historic Chinese activity.[183]

If western scholars formulated five interpretations of the Nine Dash Line, what do Chinese scholars say about the Nine Dash Line? Li Mingjiang condenses the disparate scholarly explanations of the Nine Dash Line into four interpretations. First, the Nine Dash Line represents the line of Chinese jurisdiction. This commonly accepted Chinese interpretation follows the verbiage from the *note verbales* where all islands are sovereign territory of China. ("China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters…"[184]) Therefore all maritime features within the line are Chinese. However the extent of the adjacent waters is not clearly defined by the dashed line. Second, the line is the limit of China's historic rights. In this interpretation, China maintains sovereignty over the islands, rocks, and low tide elevations, however other states enjoy freedom of navigation, and can lay cables and pipelines on the seabed. This interpretation claims the islands but also reinterprets UNCLOS EEZs. The third interpretation identifies everything within the line as Chinese internal waters. In this strict interpretation, the entire line is the outer extent of China's territorial sea. This means ships and aircraft transiting through the Nine Dash Line do not enjoy freedom of navigation. It is unclear if China would add an additional 200 nautical mile EEZ on top of the claimed territorial waters. The fourth interpretation argues that the Nine Dash Line is China's national territorial boundary. This interpretation sounds similar to the first and third interpretation. It is unclear if Li Mingjiang means the line is the extent of China's EEZ. Nevertheless, in weighing all four interpretations, it is evident that even Chinese scholars do not understand fully their government's definition of the Nine Dash Line.[185]

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183 Miyoshi, "China's U-Shaped Line," 4–6; Dupuy and Dupuy, "China's Historic Rights in the SCS," 132.

184 Permanent Mission of the People's Republic of China to the United Nations, "Note Verbale (7 May 2009)," Note Verbale, (May 7, 2009).

185 Li Mingjiang, "Reconciling Assertiveness and Cooperation? China's Changing Approach to the South China Sea Dispute," *Security Challenges* 6, no. 2 (Winter 2010): 64–65.

b. Maps and Their Contribution to ICJ and PCA Verdicts

Legal scholars question the contribution of maps in providing determinative data in ICJ and PCA Verdicts. ICJ and PCA court decisions indicate maps are information but not deciding factors of a case. This is because maps are cherry-picked evidence, subject to interpretation, and are manipulated based on state practice. First, maps from opposite claimants contradict each other. In some cases, maps from the same claimant contradict other maritime disputes with third-party states. China, in their view, has to explain inconsistencies in its Nine Dash Line map. Why did China's original map of the South China Sea have eleven dashes instead of nine? Additionally, China contradicts its own map data. The dashes from the 1947 map vary in location (and quantity) from the 2009 map. For example, the 2009 map appears to hug the Vietnamese and Malaysian coasts closer than the 1947 map (See Figure 4). Finally, on 21 October 2010, the Chinese State Bureau of Surveying and Mapping placed an electronic map online which added a tenth dash to the Nine Dash Line.[186]

[186] Franckx and Benatar, "Dots and Lines," 106; Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas China: Maritime Claims in the South China Sea* (Washington, DC: U.S. Department of State, December 5, 2014), 4–7, http://www.state.gov/documents/organization/234936.pdf.

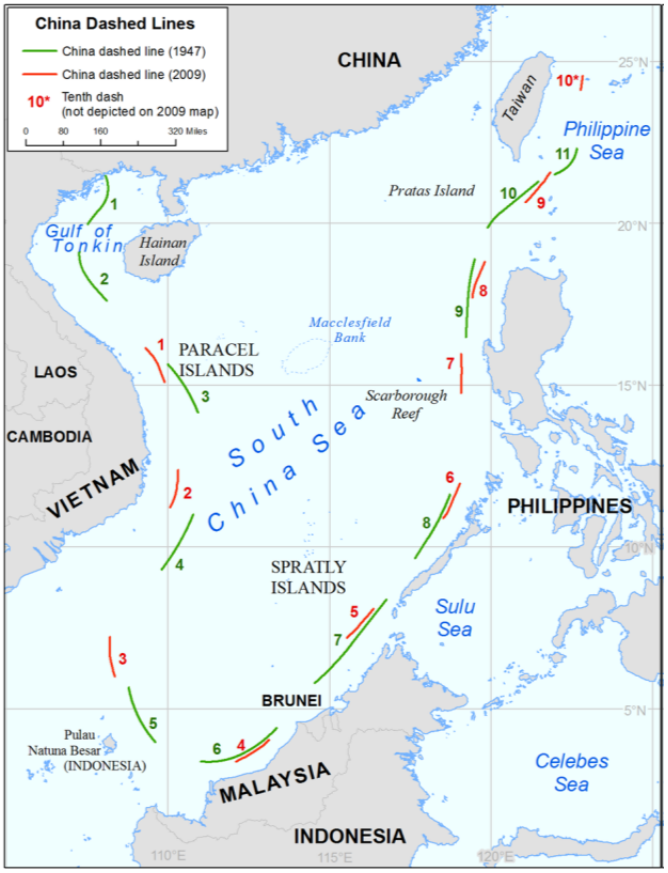

Figure 4. Map showing the disparity between the 1947 10 Dash Line and the 2009 Nine Dash Line[187]

Second, historic maps were not standardized and have ambiguous cartographic symbols, colors, and lines which are subject to interpretation. The Nine Dash Line map did not contain a key or legend defining the line.[188] Third, case law has historically established that map information is not significant. Many ICJ and PCA maritime cases included map evidence, yet they were never determinative. In the 1986 *Burkina Faso v. Republic of Mali* Case, the ICJ ruled maps alone do not constitute a claim to title.[189] All of the claimants in the maritime territorial claims discussed in the last chapter submitted map evidence (*United States v. Netherlands, Denmark v. Norway, France v. United*

[187] Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas China: Maritime Claims in the South China Sea*, 6.

[188] Ibid.; Dupuy and Dupuy, "China's Historic Rights in the SCS," 134.

[189] Burkina Faso v. Mali, 4, 585, (International Court of Justice 1986).

Kingdom, El Salvador v. Honduras, Eritrea v. Yemen, Qatar v. Bahrain, Indonesia, v. Malaysia, Nicaragua v. Colombia, Nicaragua v. Honduras, Malaysia v. Singapore). Yet none of these cases were decided based on map evidence alone.[190]

Finally, because states hire map makers, the map maker's neutrality is called into question. Maps created by the states involved in a dispute are not objective. Even maps created by an objective third party can be questioned if the source documentation of its map is derived from one of the original parties. The Nine Dash Line map was created by the government of the Republic of China. Therefore, according to critics, the map is hardly objective.[191]

c. Customary International Law and the Sino-centric View of the World

The 7 May 2009 *note verbale* (which accompanied the Nine Dash Line map,) made reference to the "widely known" understanding of "sovereign rights and jurisdiction over the relevant waters."[192] This reference alludes to the use of customary international law to defend China's claim to the South China Sea. The Sino-centric argument asserts during the Imperial Chinese period, China, its vassal kingdoms, and its neighbors viewed China as the center of the civilized world (also known as the Middle Kingdom). Vassal states paid tribute to China and conformed to its laws and culture. Even barbarian cultures recognized Chinese superiority and respected its power.[193] During this time, Chinese sailors frequently traveled, fished, and exerted their dominance over the waters surrounding mainland China. In turn, through its unique history and

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190 Dupuy and Dupuy, "China's Historic Rights in the SCS," 134.

191 Franckx and Benatar, "Dots and Lines," 107–108; Dupuy and Dupuy, "China's Historic Rights in the SCS," 134.

192 Permanent Mission of the People's Republic of China to the United Nations, "Note Verbale (7 May 2009)."

193 Dupuy and Dupuy, "China's Historic Rights in the SCS," 131-133; Beckman, "The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea," 152-156; Anthony Carty and Fozia Nazir Lone, "Some New Haven International Law Reflections on China, India and Their Various Territorial Disputes," *Asia Pacific Law Review* 19, no. 1 (2011): 101-106, (hereafter cited as "New Haven International Law").

regional dominance China is entitled to the South China Sea as its historic waters.[194] (For the remainder of this thesis, this argument will be referred to as the Sino-centric historic waters argument.)

This regional view of the world changed during the Qing Dynasty and the ensuing period of European and Japanese colonization. Yet, despite a period of western colonization, the Sino-centric historic waters view of the world remains the legal justification for many of China's controversial actions in the South China Sea. (These controversial actions include fishing bans, maritime patrols, and the construction of artificial islands. This will be discussed at length in the next chapter.) China continues to use a Sino-centric world view in its maritime claims today and frequently asserts it is backed up by customary international law. However, China's reliance on customary international law to support the Sino-centric historic waters legal argument may be overstated.[195]

To be sure, customary international law is relevant and should not be discounted in these disputes. Its relevance is so important that Article 38 of the Statute of the International Court of Justice stipulates the court will apply "international custom, as evidence of a general practice accepted as law."[196] This means any arguments citing customary international law will be weighed when determining legal verdicts. China can certainly make a case, the Sino-centric view of the world was and remains the accepted norm for the region. However, the concept of effective control is also a long held standard developed in customary international law. As the last chapter examined, international courts cited the international custom of using effective control to determine

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[194] People's Republic of China, "Diaoyu Dao, an Inherent Territory of China"; Ministry of Foreign Affairs (PRC), "The Issue of the South China Sea" (Ministry of Foreign Affairs (PRC), June 2000), https://www.fas.org/news/china/2000/china-000600.htm.

[195] Hua Chunying, "Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on September 9, 2014," *Ministry of Foreign Affairs - PRC*, September 9, 2014, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1189470.shtml; Ministry of Foreign Affairs (PRC), "The Issue of the South China Sea"; Nong, "Interpreting the U-Shape Line in the South China Sea"; Mingjiang, "Reconciling Assertiveness and Cooperation? China's Changing Approach to the South China Sea Dispute," 53.

[196] United Nations, "Statute of the International Court of Justice" (United Nations, June 26, 1945), http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

sovereignty of disputed territories. The internationally accepted norm of effective control, reinforced by customary international law will probably overrule China's regional world view. International case law has also invalidated other state's historic waters argument. The 2006 *Barbados v. Trinidad and Tobago* case clarified:

> Determining an international maritime boundary between two States on the basis of traditional fishing on the high seas by nationals of one of those States is altogether exceptional. Support for such a principle in customary and conventional international law is largely lacking.[197]

Therefore, based on legal scholars and legal precedents, China's Sino-centric historic waters argument will probably not stand up in court. Additionally, as a signatory to multilateral institutions like UNCLOS and the United Nations, China has adopted the Westphalian norm of sovereignty. Although customary international law should be looked at as a source of law, it does not apply in this case. Despite the preponderance of evidence invalidating the value and strength of a Sino-centric historic-waters legal argument supposedly backed by customary international law, China continues to cling to this legal argument. China's sustained use of this weak and unfounded legal argument to justify its actions makes the Sino-centric historic waters legal argument a quasi-legal argument.

d. Imperial Chinese Effective Control

As the last chapter pointed out, demonstrations of effective control are usually determinative in settling maritime territorial disputes. Therefore an international court would ask what effective control over islands within the Nine Dash Line would look like in Imperial China. If China maintains that the Nine Dash Line represents historic or "relevant" waters, how did Imperial China exert effective control over its territorial claims?[198] Under international law countries must demonstrate effective control through settlement or local governance. As codified in the landmark *Norway v. Denmark* case, the demonstration of effective control need not be extravagant or extensive. However, even

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[197] Barbados v. Trinidad and Tobago, 1, 83 (Permanent Court of Arbitration 2006).

[198] Permanent Mission of the People's Republic of China to the United Nations, "Note Verbale (7 May 2009)," Note Verbale, (May 7, 2009).

limited settlement or governance of these islands would be unlikely, given Imperial China's lack of the necessary water distillation and food preservation technology to sustain a settlement. Therefore, as Masahiro Miyoshi argues, there is little documentation of Imperial China exerting effective control to establish a historic claim on islands within the Nine Dash Line.[199]

e. Conclusion

In summary, the legal argument to the South China Sea using the Nine Dash Line and customary international law is flawed for four reasons. First, the PRC keeps the intent of the Nine Dash Line strategically ambiguous. Second, based on legal precedence, maps alone are not credible enough to be a legal argument. The weight that China places in the Nine Dash Line map to explain its claim contributes to the strategic ambiguity of maritime disputes in the South China Sea. Third, the Sino-centric view of the world is not supported by customary international law, additionally this world view is no longer relevant since China has acceded to Westphalian international norms and institutions. Fourth, although the bar for demonstrating effective control is low, there is insufficient evidence Imperial China exerted effective control over the islands to warrant an argument on the basis of effective control. Therefore, according to critics, the Nine Dash Line map is hardly a legal argument or legal justification for Chinese behavior in the South China Sea. One of the most important conclusions to draw from the Nine Dash Line is that it does not provide an argument supporting effective control over land. As discussed in Chapter II, effective control means everything when deciding maritime sovereignty.

4. Defending the Nine Dash Line

Scholars defend the Nine Dash Line using five arguments. First, some scholars, like Zhiguo Gao, Zhang Haiwen, Hong Nong, and Bing Bing Jia, use a discovery occupation argument by citing Chinese seafarers traveled through the islands for economic benefit since 475 BC. Records show seafarers visited the islands to collect its

[199] Dupuy and Dupuy, "China's Historic Rights in the SCS," 137–138; Miyoshi, "China's U-Shaped Line," 6–8.

resources (fish, guano, and turtle eggs).[200] Zhiguo Gao goes on to cite the travels of the "Three-Jewel Eunuch," Zheng He, who was appointed fleet admiral by the Ming emperor to spread imperial power. Zheng He conducted maritime patrols within the Nine Dash Line. The South China Sea was also a well-traveled route for merchants making their way to the Philippines, South East Asia, India, and the Mediterranean. Gao makes the argument that these maritime voyages are examples of early effective control. Gao also notes that in the 1940s, markers were placed on numerous islands in the Paracel Islands and Spratly Islands.[201] Zhang Haiwen adds the act of naming and documenting the maritime features on maps provides evidence of ownership.[202] Hong Nong provides the equation "sovereignty + UNCLOS + historic rights," which means that China is entitled to sovereign jurisdiction to the entirety of area within the Nine Dash Line.[203] Nong further clarifies the equation by explaining that China enjoys the sovereignty of the features within the Nine Dash Line, UNCLOS justifies the EEZ, and historic Chinese rights repudiate competing countries' claims.[204]

Second, Gao states that domestic Chinese laws passed in 1958 demonstrate China's claim to the contested islands. The 1958 Declaration, the 1992 Law, China's 1996 UNCLOS ratification declaration, and the 1998 Law on the Exclusive Economic Zone and Continental Shelf are Chinese laws passed which declare China's claim.[205] Third, because of the effective control China exerted over the islands, and because other claimants failed to lodge a protest, all other countries acquiesced to China's claim. Since the creation of the Nine Dash Line in the late 1940s, states have failed to protest the line. Only with the recent reaction to the *note verbale* in 2009 did Malaysia, Philippines, and Vietnam take an interest in the Nine Dash Line.

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200 Carty and Lone, "New Haven International Law," 96.

201 Gao and Jia, "Nine-Dash Line in the SCS," 101.

202 Zhang Haiwen, "Indisputable Sovereignty: Opposition to China's Ocean Claim Is Poorly Supported," *Beijing Review*, June 7, 2011, http://www.bjreview.com.cn/Cover_Stories_Series_2011/2011-06/07/content_380993.htm.

203 Nong, "Interpreting the U-Shape Line in the South China Sea."

204 Ibid.

205 Gao and Jia, "Nine-Dash Line in the SCS," 104–105.

Fourth, the United Nations Convention on the Law of the Sea (UNCLOS) conflicts with the Sino-centric view or the world. In China's case, greater weight must apply to the PRC's claim under customary international law.[206] China's claim to the South China Sea extends to the third century B.C. and clearly predates UNCLOS. Therefore, China expects its claim to the South China Sea to be assessed using customary international law.[207]

Fifth, based on the *Norway v. Denmark* case, the ICJ, PCIJ, and PCA do not require a major demonstration of effective control for sparsely populated areas like the islands within the Nine Dash Line. Carty poses the argument that technology did not exist to sustain human habitation or economic gain. This argument was codified in the British Foreign Commonwealth Office, Memorandum on claims to Spratly Islands in South China of 1974, which argued that China had the best claim to the Paracel and Spratly Islands.[208]

5. Responding to Defenders of the Nine Dash Line

Arguments supporting the Nine Dash Line have some flaws. First, arguments stating that the Chinese were the only people to sail the South China Sea is narrow-minded. The voyages of other mariners from ancient Vietnam, Philippines, or Malaysia are completely ignored or discounted. The Vietnamese Ministry of Foreign Affairs provides examples of Vietnamese voyages during the same time frame of the Chinese claim.[209]

Second, although China makes a case that unilaterally created domestic legislation over the islands are examples of effective control, scholars fail to note that

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206 Ibid., 99–122.

207 Haiwen, "Indisputable Sovereignty: Opposition to China's Ocean Claim Is Poorly Supported"; Mingjiang, "Reconciling Assertiveness and Cooperation? China's Changing Approach to the South China Sea Dispute," 53.

208 Carty and Nazir Lone, "New Haven International Law," 96–111.

209 Ministry of Foreign Affairs - Vietnam, "Evidence about Vietnam's Sovereignty over Hoang Sa and Truong Sa Archipelagoes through the Nguyen Dynasty's Officials Documents In The Early 19th Century," *Vietnam's Sovereign Boundaries*, October 24, 2013, http://123.30.50.199/sites/en/evidenceaboutvietnam-ssovereigntyoverhoang-gid-engbd569-nd-eng22fd7.aspx.

domestic laws must be enforced on the maritime feature in order to demonstrate sovereign control. Nevertheless, as the *Norway v. Denmark* case demonstrated, diplomatic agreements mentioning the islands specifically by name do reveal an intent to act as a sovereign. However, this is a weak effective control argument without on-island enforcement.

Third, defenders of the Nine Dash Line fail to show how China enforced domestic laws within the Nine Dash Line that provide clear evidence of effective control.[210] Demonstration of effective control, the most determinative factor in settling maritime disputes, has not been proven by proponents of the Nine Dash Line. The voyages of the third century explorers around the islands do not constitute effective control over the islands. Unilaterally passing domestic legislation covering the claimed islands does not prove effective control over the islands. Sovereignty markers may have been placed on some of the islands, but more evidence of this is needed to truly strengthen China's legal title. In summary defendants of the Nine Dash Line do not adequately support it in contemporary international law.

Fourth, the legal arguments from Zhiguo Gao, Zhang Haiwen, and Hong Nong are circular and based on gross assumptions of Chinese sovereignty. They assume because China has historic rights, China has automatic sovereignty. Their arguments do not address competing claims from other states because historic rights (and the Sino-centric historic waters argument) overrule all other claims. Additionally, none of these Chinese scholars address on-island effective control. It appears they believe that, because China discovered and named a feature, it has a historic title to the claim. These scholars do not complete the second part of the discovery occupation equation and prove China has historic rights due to occupation (effective control).

For western scholars, the Nine Dash Line does nothing to strengthen China's legal claim. The Nine Dash Line does not demonstrate effective control on islands or rocks of the South China Sea. Yet for Chinese scholars, the Nine Dash Line represents China's historic claim reinforced by customary international law. The confidence Chinese legal

210 Gao and Jia, "Nine-Dash Line in the SCS," 99–124.

scholars have in the Nine Dash Line is overstated. Unless China develops a historic title narrative that incorporates effective control, it will be blindsided by the weakness of its Sino-centric historic title legal argument. China's Nine Dash Line is neither reinforced by international law or customary international law. Its overconfidence in the Nine Dash Line and the Sino-centric historic waters legal argument is so weak that its repeated use forces states to question China's geopolitical intent. This thesis has already labeled the Sino-centric historic waters argument as a quasi-legal argument. Chapter III will discuss China's use of the quasi-legal argument as part of a strategy of legal warfare. The continued use of the quasi-legal argument could be used to mask expansionist conduct. The next two sections will look past the weak legal argument provided by the Nine Dash Line and examine both cases in contemporary international law.

D. WHY THE PARACEL ISLAND CASE FAVORS CHINA

Using the Sumner methodology presented in Chapter II, the facts suggest that China has a strong legal claim to possession of the Paracel Islands.[211] Both China and Vietnam have conflicting historic claims that date into their respective imperial periods. An international court would find it difficult at best to rule on the historic title and *uti possidetis* alone, owing to the complicated chain of title and the inevitable use of a Sino-centric perspective of the world. For example, in 1816 the King of Annam (Vietnam) annexed the Paracel Islands. At the time, Vietnam was a vassal state of Qing China. Therefore the annexation of the Chinese claimed Paracel Islands by a vassal state of China would lead to a confusing line of historic title. Can a Chinese vassal state annex Chinese islands? Annexation of the Paracel Islands by Vietnam when it was a Chinese vassal kingdom constituted annexing a territory from China in the name of China. If a vassal state annexes islands, does the title carry over to the ruling kingdom?[212]

The more relevant periods of occupation occurred during the twentieth century. China physically occupied and provided administration of the islands from 1900 to

[211] Sumner, "Territorial Disputes at the ICJ," 1803–1804.

[212] Carty and Nazir Lone, "New Haven International Law," 101–102.

1932.[213] In 1938, France entered the dispute by declaring ownership of the Paracel Islands with governance and administration based out of Cochinchina (the former French colonial administrative region at the southern tip of modern day Vietnam).[214] During World War II, Japan occupied the Paracel Islands. In 1955, after recovering the islands from the Japanese as a result of the San Francisco Treaty, China reoccupied Woody Island and the eastern Paracel Islands.[215] Meanwhile, in 1956, French forces turned over custody of the western Paracel Islands to South Vietnam.[216] In 1956 and 1958, North Vietnam recognized China's Territorial Sea Declaration which stated China's claim to the Paracel and Spratly Islands. This is relevant because it is an example of North Vietnamese acquiescence.[217] In the 1974 occupation of the Paracel Islands, China defeated South Vietnam giving the PRC control over the entire Paracel archipelago. China has maintained *de facto* control of the Paracel Archipelago ever since. After China wrested control of the Paracel Islands from South Vietnam, North Vietnam raised no objection. Although North Vietnam did not protest the occupation at the time, the current Vietnamese Ministry of Foreign Affairs contends the South Vietnamese protest in 1974 constitutes a protest against China's occupation on behalf of the greater Vietnam. Today, Vietnam continues that protest over the Paracel Islands.[218]

1. Uti Possidetis

A legal ruling using *uti possidetis* would be difficult to trace. France bequeathed its portion of the Paracel Islands to its South Vietnamese heir-apparent. Logically, when North Vietnam defeated South Vietnam in April 1975, the unification of greater Vietnam was complete. Former South Vietnamese territory became Vietnamese territory.

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213 Ibid., 97.

214 Sarah Raine and Christian Le Miere, *Regional Disorder: The South China Sea Disputes* (New York: Routledge, 2013), 37.

215 Ibid., 39.

216 Ibid., 39–40.

217 Carty and Nazir Lone, "New Haven International Law," 97.

218 Ministry of Foreign Affairs (Vietnam), "The East Sea Issue under the Light of International Law," *Vietnam's Sovereign Boundaries*, August 22, 2011, http://123.30.50.199/sites/en/theeastseaissueunderthe-gid-eng1903a-nd-eng3b1b0.aspx.

However, China conquered the Paracel Archipelago before Vietnam was unified. Vietnam could make a case the islands were legally entitled to them as the heir apparent following the fall of South Vietnam. However, China could argue the conquest prevented this title from changing hands and North Vietnam was not the intended heir to the Paracel Islands. Based on these two competing arguments for title, no clear determination using *uti possidetis* is available. An exception may emerge if the court was asked to determine if China's control over the Paracel Islands is actually belligerent occupation. If the court examined a belligerent occupation argument, all Chinese effective control since 1974 would be invalid and a court could rule in Vietnam's favor. Looking at how the courts viewed the confusing chain of title using *uti possidetis* in *El Salvador v. Honduras*, *Eritrea v. Yemen*, *Indonesia v. Malaysia*, and *Nicaragua v. Honduras*, the court may have to look at effective control as a clear and objective way of settling the dispute.

2. Effective Control

Effective control is usually the single most compelling legal argument for settling maritime territorial disputes. China's claim to the Paracel Islands is very strong, with multiple examples of effective control. First, the Paracel Islands remain under *de facto* control of the People's Republic of China. The PRC applies domestic administrative control across the Paracel Archipelago. This is shown through the enforcement of laws on the islands. The islands are also under the control of Hainan Province.[219]

Second, China has conducted multiple public works projects on the island. State funded public works projects are clear demonstrations of the intent to act as a sovereign. Examples of public works include the construction of an airstrip, port facility, hospital, library, and cell phone coverage.[220] Naturally, the state-funded services provided by these buildings also builds China's effective control legal case. Third, the People's Liberation Army has conducted deployments on the ground in the Paracel Islands.

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[219] Keyuan, "Scarborough Reef: New Flashpoint," 74.

[220] Michael Bristow, "China to Build School in Contested Paracel Islands," *BBC News Asia*, June 15, 2014, http://www.bbc.com/news/world-asia-27856082.

3. Vietnamese Acquiescence

In order to support an argument for effective control, a claimant could also argue the opposing claimant acquiesced its territory. Effective control arguments are stronger when combined with evidence the opposing claimant vacated its entitlement to a territory. North Vietnam acquiesced in 1956 and 1958 when it recognized the PRC's Territorial Sea Declaration. This declaration asserted China's claim to the Paracel and Spratly Islands. Following the 1974 Chinese occupation of the entire Paracel Archipelago, North Vietnam did not protest the Chinese occupation. A North Vietnamese protest would have represented a protest from a united Vietnam. Even though in 1974 North Vietnam had not unified the entire country, it is indisputable that North Vietnam maintained a clear intent to unify the entire country. This is evident in the war of independence it fought against France and the United States. Had North Vietnam been content with a separated state, it would not have initiated a war against South Vietnam. Therefore, after demonstrating its intent to unify the country, North Vietnam spoke for the unified Vietnam. This makes all examples of North Vietnamese acquiescence compelling.

After China successfully invaded the Paracel Islands in 1974, North Vietnam did not lodge a protest. Instead, South Vietnam lodged the protest as the claimant that had just lost its islands to China. Eventually, the newly unified Vietnam assumed South Vietnam's stance and protested Chinese occupation of the Paracel Islands (amid deteriorating relations with China).[221] The North Vietnamese failure to lodge a protest immediately after the invasion suggests acquiescence. North Vietnam had three reasons not to protest. First, North Vietnam pragmatically recognized it could not alienate its powerful communist ally to the north. Second, in 1974, North Vietnam did not have a navy to re-take the islands. Third, North Vietnam was preoccupied with winning its war against the United States. Nevertheless, North Vietnam in 1974 acquiesced its claim to China.

[221] Ministry of Foreign Affairs (Vietnam), "The East Sea Issue Under the Light of International Law"; Raul A. "Pete" Pedrozo, *China versus Vietnam: An Analysis of the Competing Claims in the South China Sea*, CNA Occasional Paper (Arlington, VA: CNA Corporation Strategic Studies, August 18, 2014), 104–108, http://www.cna.org/research/2014/china-versus-vietnam.

4. Defending Vietnam's Claim

To protest the PRC's claim, Vietnam's argument would likely reason that France intended for South Vietnam to control the Paracel Islands based on *uti possidetis*. After the unification of Vietnam, South Vietnamese territory became greater Vietnamese territory. China illegally conquered the islands by force contrary to the UN Charter, therefore a state of belligerent occupation has existed since 1974. In this view, while China maintains *de facto* control over the islands to this day, its sovereignty should not be recognized in a court of law, nor should any demonstrations of Chinese effective control since 1974. This would be Vietnam's only legal defense as it has not exercised effective control over the islands since 1974. Although this is a strong argument, it is nullified by the acquiescence argument. If North Vietnam represented the greater Vietnamese government then it should have protested China's invasion of the Paracel Islands immediately after its invasion.

5. Summary of the Paracel Islands

In conclusion, based on evidence of Chinese effective control and acquiescence from North Vietnam, the Paracel Islands legally belong to China. Analysis of history revealed tracing a chain of title from dynastic rule to the French colonial period was convoluted and inconclusive. Some of the Chinese claims used customary international law based on the Sino-centric view of world. *Uti possidetis* would not reveal a clear and decisive verdict due to the intervening Chinese occupation of the islands before South Vietnam was unified. Effective control would clearly determine Chinese ownership because of its *de facto* control over the islands. Additionally North Vietnam acquiesced to the PRC's claim in 1956, 1958, and 1974. Vietnam's only legal defense of the islands would use a belligerent occupation argument. However China's effective control and corresponding North Vietnamese acquiescence arguments remains very strong.

E. THE SCARBOROUGH SHOAL CASE

The Scarborough Shoal is a recently disputed claim between China and the Philippines. Similar to Vietnam's claim to the Paracel Islands, China claims the

Scarborough Shoal based on Imperial-era trade and the Sino-centric view of the world.[222] China's historic claim to the Scarborough Shoal is based on its arguable ownership of the Zhongsha Island (more commonly known as Maccesfield Bank). China contends the Zhongsha Islands are a large archipelago that incorporates the Scarborough Shoal. (It should be noted Maccesfield Bank, a low-tide elevation, is approximately 170 nautical miles west of the Scarborough Shoal. As a low tide elevation outside of territorial waters, Maccesfield Bank would not earn any sovereignty and would not produce a territorial sea, let alone a 200 nautical mile EEZ.)[223] As already described, Scarborough Shoal is a submerged feature with a rock. The fact that the only feature states can exert effective control over is a tiny rock, significantly influences how states can provide effective control and concurrently affects the strength or weakness of that effective control.

The dispute initially came to light in 1997 when a Philippine naval vessel prevented Chinese vessels from approaching the Shoal. The crew of the Philippine naval vessel apparently raised a Philippine flag on one of the Scarborough rocks.[224] 2012 was an eventful year in the waters surrounding the Shoal. As described above, the BRP *Gregorio del Pilar* attempted to arrest Chinese fishermen who were extracting marine life from the shoal. PRC maritime security vessels quickly responded initiating a standoff. Since 2012, China has maintained a continual presence at Scarborough Shoal.[225] In 2012, China placed the islands of the South China Sea under administrative control of Hainan Province.[226] That same year, China instituted an annual fishing ban in the vicinity of Scarborough Shoal.[227] In January of 2013, the Philippines submitted the dispute over the Scarborough Shoal and the Spratly Islands to the International Tribunal for the Law of

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222 Gao and Jia, "Nine-Dash Line in the SCS," 100–101.

223 Zou Keyuan, "Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?," *IBRU Boundary and Security Bulletin* 7, no. 2 (1999): 71.

224 Keyuan, "Scarborough Reef: New Flashpoint," 73.

225 Mark E. Rosen, *Philippine Claims in the South China Sea: A Legal Analysis*, CNA Occasional Paper (Arlington, VA: CNA Corporation Strategic Studies, August 18, 2014), 7–8, http://www.cna.org/research/2014/philippine-claims-south-china-sea.

226 J. Michael Cole, "China Deploying 'Military Garrison' to South China Sea," *The Diplomat*, July 23, 2012, http://thediplomat.com/2012/07/more-prc-forces-into-south-china-sea/, (hereafter cited as "Military Garrison").

227 Xinhua, "Fishing Ban Starts in South China Sea," *Xinhua*, May 17, 2012, http://news.xinhuanet.com/english/china/2012-05/17/c_131592412.htm; Hunt, "Fishing Ban."

the Sea (ITLOS).[228] About a month later, the PRC submitted a diplomatic note stating it rejected the Philippines's request for arbitration. To date, no verdict has been provided by the tribunal.

1. Applying International Law to the Scarborough Shoal

Before analyzing the case using Sumner's methodology it is important to review relevant legal precedents. The legal dispositions of low-tide elevations were first discussed in *Qatar v. Bahrain*. The case stated sovereignty over a low-tide elevation can be determined if it falls within a territorial sea.[229] The Scarborough Shoal is outside of the territorial sea of the Philippines and any Chinese claim (that is unless China claims everything within the Nine Dash Line as its own territorial sea). To clarify, the two nearest Chinese claims are the Spratly Islands and Maccesfield Bank. If the Chinese claim to the Spratly Islands or Maccesfield Bank were valid, Scarborough Shoal would still remain well outside of the 12 nautical mile territorial seas to justify a claim.

The legal disposition of rocks has rested on two separate legal arguments. The first argument, which is similar to low-tide elevations, is the territorial sea argument. As observed in *Eritrea v. Yemen*, the PCA granted sovereignty of the Mohobbakahs islets to Eritrea based on its location within the Eritrean territorial sea.[230] The second argument is effective control. In *Qatar v. Bahrain*, the ICJ granted sovereignty of Qit'at Jaradah (a rock by definition) to Bahrain based on the construction of a navigation marker constructed by the government of Bahrain. Therefore rocks are subject to demonstrations of effective control just like islands.

In contrast to the Senkaku Islands and the Paracel Islands, the Scarborough Shoal case is dramatically different as it is a low-tide elevation and a rock. This definitional difference will make Sumner's methodology in determining sovereignty (using treaty law, *uti possidetis*, and effective control) difficult to apply in this case.[231] First, no

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228 Department of Foreign Affairs (Philippines), "Notification and Statement of Claim over the South China Sea," January 22, 2013.

229 *Qatar v. Bahrain*, 101.

230 *Eritrea v. Yemen*, 131–133.

231 Sumner, "Territorial Disputes at the ICJ," 1803–1804.

bilateral treaty discusses the ownership of the Scarborough Shoal. China's declaration in UNCLOS claims the Zhongsha Islands via its domestic 1992 Law. However, the Philippines are not bound to recognize China's declaration simply because it is a state party to UNCLOS.[232]

Second, during Spanish and American colonization, no title to the shoal was bequeathed to the Philippine state, which makes analysis using *uti possidetis* nonviable. Concurrently, during European colonization of China, no colonial power bequeathed Scarborough Shoal to China. Although treaties between Spain and the United States established the archipelagic baselines of the Philippines in 1898 and 1901, Scarborough Shoal remains 13.5 nautical miles outside of this baseline and therefore outside of the Philippine territorial sea.[233]

Third, effective control is difficult to demonstrate in this case. Rocks by definition are incapable of sustaining human life or economic viability.[234] Therefore the ability of a claimant state to generate examples of effective control on the rock is limited. A human can barely stand on South Rock, the largest rock of the Scarborough Shoal, therefore demonstrations of effective control would be limited to the placement of markers or flags on the rocks as opposed to the administration of a population. Therefore the small and barren nature of South Rock prohibits states from demonstrating strong examples of effective control.

As discussed in the analysis of the *Norway v. Denmark*, the legal bar for demonstrating effective control over remote islands (or rocks) is low. Both the Philippines and China would argue their naval or law enforcement patrols within the 12 nautical miles of the Shoal constitute effective control. However, as demonstrated in *Malaysia v. Indonesia* and *Nicaragua v. Honduras*, the ICJ concludes effective control must take place on land and not in the surrounding waters.

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232 United Nations, "UNCLOS."

233 Keyuan, "Scarborough Reef: New Flashpoint," 75.

234 United Nations, "UNCLOS," 68.

China may contend that it demonstrates effective control over the rock from its administrative headquarters in Hainan Province.[235] However, as seen in *Nicaragua v. Honduras*, passing laws that vaguely reference maritime features without enforcement of those laws on the actual territory is not a demonstration of effective control.

According to a statement by the Philippine Department of Foreign Affairs, the Philippines conducted three demonstration of on-rock effective control. First (and second), the Philippine flag was raised on the rock in 1965 and later in 1997. Third, the Philippines states it built and operated a lighthouse in 1965. The lighthouse was registered with the International Maritime Organization for eventual publication in its "List of Lights" (a comprehensive list of worldwide navigational aids). However this lighthouse is no longer in operation, nor is there physical evidence at the shoal such a lighthouse existed.[236]

Hoisting the flag of the Dutch monarchy was one of many demonstrations of effective control used in the *United States v. Netherlands* case. As Chapter II showed, lighthouse construction and operation is a common means to demonstrate effective control in multiple ICJ and PCA cases. Even the intent to operate a lighthouse was evidence of effective control in the case of *Eritrea v. Yemen*. However, the question remains: were these examples the best and only demonstrations of on-rock effective control? The flag raising might be enough to sway a court in favor of the Philippines, but the question remains as to whether it would be enough. Are there more historic demonstrations of on-rock effective control that have been made by either side? Are there examples of effective control that are not known because China refuses to participate in the South China Sea arbitration? In the end, the 1965, and 1997 flag raising is the best example of effective control. The existence of the lighthouse could lend even more credibility to the Philippines claim if it can be proven. Therefore the Philippines claim to Scarborough Shoal is weak but better substantiated.

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[235] Cole, "Military Garrison."

[236] Department of Foreign Affairs (Philippines), "Philippine Position on Bajo de Masinloc (Scarborough Shoal) and the Waters within Its Vicinity."

On 22 January 2013, the Philippines submitted the dispute over the validity of the Chinese Nine Dash Line and the Scarborough Shoal to the International Tribunal for the Law of the Sea. To date, China has refused to participate in this arbitration. At first glance, the South China Sea arbitration could settle this dispute and resolve conflict over the Nine Dash Line. The Philippine claim seeks to have ITLOS invalidate the Nine Dash Line, rule on the status of rocks versus islands in the South China Sea, and prevent future Chinese encroachment in the Philippine EEZ. However, the underlying legal question of this case is the sovereignty of the Chinese and Philippine claims in the South China Sea. The jurisdiction of the ITLOS is limited to resolving conflicts within UNCLOS and this court does not resolve disputes over sovereignty. Only the PCA and ICJ can settle sovereignty disputes. Therefore, there is a good chance the Philippine case will be thrown out because it is outside of the jurisdiction of ITLOS.[237]

2. Conclusion

In summary, the Scarborough Shoal remains a controversial legal claim because its disposition as a low-tide elevation with a rock. Analyzing treaty law and *uti possidetis* did not reveal a clear claim to the Shoal. Planting the Philippine flag in 1965 and 1997 is the only unambiguous on-rock demonstration of effective control. Based on the low bar of proof established by the *Norway v. Denmark* case, this might be enough for a court to rule in the Philippines' favor. However, until more historic examples of effective control can be provided, or more tangible and permanent forms of effective control are demonstrated on the Scarborough Rocks, no state can claim the shoal. Although the case was submitted to ITLOS, it will be likely thrown out because ITLOS lacks the jurisdiction to rule on the sovereignty of the islands in the South China Sea.

China's refusal to participate in arbitration provides strong evidence its behavior is not limited by institutions. China's acceptance of arbitration would have provided strong evidence China is willing to conform to international institutions in order to peacefully resolve disputes through the rule of law. Instead, Chinese behavior appears to be motivated by self-help factors like power. Although the liberal institutionalist

237 Talmon and Jia, *The South China Sea Arbitration: A Chinese Perspective*, 107–135.

framework does not account for China's rejection of arbitration, the English School of Realism explains that states reserve the right to reject international norms for self-interest. In this case, China prefers to use bilateral negotiation rather than arbitration so it can use its advantages in power. Additionally, realism rejects any constraints by international law therefore this episode provides evidence China's behavior is also realist.

F. CHAPTER CONCLUSION

In conclusion, this chapter discussed the legal claims for the Senkaku Islands, the Paracel Islands and the Scarborough Shoal. It also assessed the legality of China's Nine Dash Line. The chapter used the methodology presented in the previous chapter to review the sovereignty claims in three cases based on treaty law, *uti possidetis*, and effective control. Paralleling the findings from last chapter, in all three cases, treaty law and *uti possidetis* would likely be inconclusive and the cases force the examination of effective control. The Senkaku Island case suggests that Japanese effective control and a brief period of Chinese acquiescence lend strong support to Japan's claim to the islands. The analysis of the Paracel Islands case indicates that China's effective control since 1974 and North Vietnamese acquiescence give China the strongest legal case. The Scarborough Shoal case is complicated because, as the maritime feature is a low-tide elevation and rock, any demonstration of effective control is very difficult. In the end, the planting of the Philippine flag in 1965 and 1997 makes a weak but minimal case for effective control in support of the Philippine claim. The justification for China's Nine Dash Line is based on quasi-legal arguments and is unlikely to stand up in court.

In the context of this thesis, to strengthen its legal claim, China would need to augment demonstrations of effective control to bolster a weak legal case (in the Senkaku Islands and Scarborough Shoal) or to maintain an already strong legal case (in the Paracel Islands). As will be discussed in the next chapter, China has developed the strategy of the Three Warfares where legal warfare is identified as an approach in achieving China's strategic objectives. The legal warfare strategy uses international law to justify demonstrations of effective control to fortify China's maritime claims.

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IV. CHINESE LEGAL WARFARE

A. INTRODUCTION

This chapter will discuss China's use of "Legal Warfare" and seek to answer the research question: do international legal principles govern China's past and present behavior in these disputes? Despite the strengths and weaknesses of its claims, China uses a strategy called "Legal Warfare" to fortify its legal position around the disputed maritime territories. In order to examine this argument, the chapter will cover seven topics. First, the chapter will define legal warfare. Legal warfare uses laws to justify a state's actions, invalidate an adversary's actions, and provide a legal justification why a state acts outside of the law. Second, this chapter will discuss the origins of Chinese legal warfare. Third, the chapter will discuss the overall strategy of legal warfare and how it affects national goals. Legal warfare strategy strengthens the legitimacy of China's actions and attempts to delegitimize an adversary using a combination of laws and public opinion. Fourth, this chapter will discuss how China uses legal warfare tactics. Some of these tactics include the implementation of an air defense identification zone or the use of maritime patrols around disputed maritime territories. Fifth, the chapter will provide examples of legal warfare in the three maritime dispute case studies. China uses legal warfare in the Senkaku Islands, Paracel Islands, and the Scarborough Shoal. Sixth, it will discuss legal warfare outside of the three case studies. Finally, the chapter will describe how China is not the only state using legal warfare in its maritime disputes. This chapter will briefly discuss the use of legal warfare by Japan, Vietnam, and the Philippines.

The use of legal warfare provides evidence that China's behavior is governed by international legal principles or at least legal principles (like customary international law) that justifies its actions. To be sure, some of China's actions could be viewed as irredentist non-lethal behavior that uses legal arguments to disguise its true intent. This is

certainly the opinion of some non-Chinese scholars who explain China's behavior using offensive realism.[238] This question will be analyzed in the next chapter.

The use of legal warfare suggests that Chinese behavior related to its maritime disputes is best explained by the English School of realism. The English School of Realism explains that states will conform to rules and norms in order to participate within a society of states. However, in a self-help international system, states also reserve the right to change or ignore rules and norms as it sees fit. Some of China's behavior conforms to international law and norms like the respect for mutual co-existence. However, China's use of a Sino-centric historic waters legal argument provides evidence it is trying to redefine how sovereignty is determined in its maritime disputes.

As argued in Chapter II, international courts tend to settle maritime territorial disputes using treaty law, *uti possidetis*, and effective control. Of the three categories of legal arguments, demonstrations of effective control are overwhelmingly the most determinative. The last chapter discussed the strengths and weaknesses of China's legal claim to three maritime disputes. Japan's claim to the Senkaku Islands is very strong because of repeated demonstrations of effective control on the island since 1895. China's claim to the Paracel Islands is solid due to demonstrations of effective control across the islands since 1974. Finally, the Philippines' claim to Scarborough Shoal is valid but weak because of a two demonstrations of effective control on a rock. China's use of legal warfare can strengthen a weak legal position (like in the Senkaku Islands or Scarborough Shoal) or it can revalidate an already strong legal position (like in the Paracel Islands).

B. DEFINING LEGAL WARFARE?

In short, legal warfare uses law as an important political tool. One scholar who wrote extensively on legal warfare is retired Major General Charles J. Dunlap, Jr. He defined legal warfare as "a method of warfare where law is used as a means of realizing a

[238] David Shambaugh, "Coping with a Conflicted China," *Washington Quarterly* Winter 2011 (Winter 2011): 12–13; Ely Ratner, "A Plan to Counter Chinese Aggression," *The Wall Street Journal Asia*, June 11, 2014, sec. Business and Economics; Patrick M. Cronin, "Muddy Waters," *International Herald Tribune*, April 26, 2012.

military objective."[239] In a subjective sense, law is interpreted differently by different sides of a conflict, so Dunlap also adds that legal warfare is "the strategy of using--or misusing--law as a substitute for traditional military means to achieve an operational objective."[240]

There are four problems with Dunlap's definition of legal warfare in the context of China and its maritime disputes. First, Dunlap correlates legal warfare as a means to reach a military objective as opposed to a political objective. As Carl Von Clausewitz famously stated, "War is merely the continuation of policy by other means."[241] In the maritime disputes, obtaining or maintaining sovereignty of disputed islands is done for political reasons not military reasons. Second, although Dunlap makes a case that legal warfare works at the operational level, it is relevant at the strategic level as well. Again, the sovereignty disputes in the East and South China Seas are strategic, not operational, concerns. Third, using and misusing law goes both ways. Although major powers like China can use law to support its cause, other state or non-state actors can use law against China. Fourth, although it is called legal warfare, a state of war does not need to exist as a precondition for its use. China is conducting legal warfare against Japan, Vietnam, and the Philippines; likewise, these countries are conducting legal warfare against China and in some cases against each other. However, none of these three countries are in an official state of war with each other.

As Dunlap's definition of legal warfare is vague and problematic, legal warfare can be reinterpreted as pursuing three primary objectives. First, legal warfare argues one's "own side is obeying the law." Second, it condemns the opponent for "violating the

239 Charles J. Jr. Dunlap, "Lawfare: A Decisive Element of 21st Century Conflicts?" *Joint Forces Quarterly* 54, no. 3rd Quarter 2009 (2009): 35, (hereafter cited as "Lawfare: A Decisive Element").

240 Ibid.

241 Carl Von Clausewitz, *On War* (Princeton, NJ: Princeton University Press, 1976), 87.

law." Finally, legal warfare "makes arguments for one's own side in cases where there are also violations of the law."[242]

One historic and controversial argument where the three primary objectives of legal warfare were applied was the treatment of detainees from the war in Afghanistan. In 2002, the Bush Administration contended the United States military obeyed the 1949 Geneva Convention as a military engaged in combat. United States service members were lawful combatants that wore uniforms and operated in clearly marked military vehicles while focusing their aggression against an enemy. Conversely, the Bush Administration classified Taliban and Al Qaida fighters as "unlawful combatants" because they were civilians committing belligerent acts. Based on this definition, Taliban and Al Qaida fighters did not earn protection under the Geneva Convention. By classifying enemies as "unlawful combatants," the Bush Administration claimed that Taliban and Al Qaida personnel could be held indefinitely in the military prison at Guantanamo Bay, Cuba, and could be subject to controversial interrogation techniques, which some critics argue was torture. In this specific case, the Bush Administration justified its behavior outside of the Geneva Conventions.[243]

1. The Origins of Chinese Legal Warfare

Legal Warfare was first mentioned by a Chinese publication in the 2003 *Chinese People's Liberation Army Political Work Regulations*. This document stated legal warfare was part of the larger "Three Warfares" strategy. The "Three Warfares" included media warfare (also referred to as public opinion warfare), psychological warfare, in addition to legal warfare. Media Warfare is designed to manipulate both domestic and international opinion to build support for Chinese actions. Psychological Warfare attempts to demoralize the enemy and targets the enemy's willingness to wage war. The

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[242] Han Yanrong, "Legal Warfare: Military Legal Work's High Ground: An Interview with Chinese Politics and Law University Military Legal Research Center Special Researcher Xun Dandong," *Legal Daily (PRC)*, February 12, 2006, quoted in Dean Cheng, "Winning without Fighting: Chinese Legal Warfare," *The Heritage Foundation* 2692 (May 18, 2012): 2, (hereafter cited as "Winning without Fighting").

[243] Jennifer Elsea, *Treatment of 'Battlefield Detainees' in the War on Terrorism* (Congressional Research Service, January 13, 2005), CRS–1 – CRS–9.

U.S. Department of Defense defined legal warfare as using, "international and domestic laws to gain international support and manage possible political repercussions of China's military actions."[244] The "Three Warfares" are a form of information warfare and intended to give China an advantageous strategic position in both peace and wartime. The "Three Warfares" would be used before, during, and after war to shape domestic, enemy, and international opinion to favor China.[245]

By combining media warfare and psychological warfare with legal warfare, China intends to "control the enemy through the law, or by using the law to constrain the enemy."[246] In a hypothetical scenario, legal warfare uses law to legitimize Chinese actions and to delegitimize or vilify an opponent. Media and psychological warfare publicizes the legitimate actions of China and the illegitimate actions of the opponent. Legal warfare can work alone or in conjunction with the other two warfares. For example, an unpublicized encounter between the Coast Guard vessels of China and Vietnam could be an example of legal warfare operating alone. However, if that encounter between claimants is widely publicized and justifies China's actions and vilifies the other claimant, then the encounter is using the other two warfares.

The use of legal warfare perfectly complements China's Five Principles of Peaceful Coexistence. Dunlap also contends, "Many uses of legal 'weapons' and methodologies avoid the need to resort to physical violence and other more deadly means."[247] The use of international legal principles promotes respect for China's sovereignty, promotes non-aggression, non-interference, and inevitable peaceful co-

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[244] Office of the Secretary of Defense, "Annual Report to Congress: Military Power of the People's Republic of China 2009" (Office of the Secretary of Defense, 2009), 16.

[245] CPC Central Committee and Central Military Commission, "People's Liberation Army Political Work Regulations" (CPC Central Committee, December 5, 2003); Timothy A. Walton, "China's Three Warfares" (Delex Consulting, Studies, and Analysis, January 18, 2012), 5; Office of the Secretary of Defense, "Annual Report to Congress: Military Power of the People's Republic of China 2009," 16.

[246] Cheng, "Winning without Fighting," 7, quoting Wenshen Zong, *Legal Warfare: Discussion of 100 Examples and Solutions* (Beijing, PRC: PLA Publishing House, 2004), 5.

[247] Dunlap, Charles J. Jr., "Lawfare Today... and Tomorrow," in *International Law and the Changing Character of War*, ed. Raul A. "Pete" Pedrozo and Daria P. Wollschlaeger, vol. 87 (U.S. Naval War College International Law Studies, 2011), 315.

existence.[248] Avoiding conflict harkens back to a strategy of Sun Tzu who wrote, "for to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill." [249] Although the "Three Warfares" appeared in 2003, it is a 21st century adaptation of Chinese military theory dating back to Sun Tzu.

2. The Strategy of Legal Warfare

Dean Cheng, a conservative western scholar who wrote about Chinese legal warfare, observed that the strategy of legal warfare entails its use, "as an offensive weapon capable of hamstringing opponents and seizing the political initiative."[250] Using laws and public opinion is a very effective strategy in the 21st century. Democracies are particularly susceptible to legal warfare. Well publicized events captured on video have the ability to turn public opinion very quickly. Free press and globalized mass communication can spread news quickly. The effect of public opinion inherently affects the electorate, which in turn affects the government. If the electorate of a democratic state feel China's actions are legitimate it would likely be very difficult for that state to go to war against China.[251]

3. The Tactics of Legal Warfare

The last section discussed the strategic goals of legal warfare attempt to stifle and delegitimize an opponent. Additionally, appropriate use of legal warfare can prevent conflict. This section will broadly discuss China's legal warfare tactics. They include the use of the military, law enforcement, and legal experts.

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248 Ministry of Foreign Affairs (PRC), "China's Initiation of the Five Principles of Peaceful Co-Existence," *Ministry of Foreign Affairs - PRC*, accessed September 1, 2014, http://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18053.shtml.

249 Sun Tzu, *The Art of War*, trans. Samuel B. Griffith (New York: Oxford University Press, 1971), 77.

250 Cheng, "Winning Without Fighting," 1.

251 Dunlap, "Lawfare: A Decisive Element," 35.

In discussing how legal warfare is used by China, Dean Cheng stated that, "legal warfare, therefore, is not decisive on its own – it must be backed by military capability"[252] Legal warfare cannot simply rely on the existence of laws to deter actors; there must be local actors to enforce laws or collect evidence. According to Cheng, that local actor can be a soldier on the ground or a naval vessel at sea. However, China does not always need to use the PLA to conduct legal warfare, instead it can use non-military power as well. For example, China uses maritime law enforcement vessels to exert control around disputed maritime claims and throughout the claimed Nine Dash Line. The use of both the military and maritime law enforcement will be discussed in more detail below in the specific case studies.

In addition to law enforcement, non-military aspects of legal warfare will use, "domestic legislation, international legislation, judicial law, legal pronouncement."[253] Domestic legislation has included China's 1992 Law on the Territorial Sea and the Contiguous Zone. This domestic law asserts China's claim to Taiwan, the Senkaku Islands, Penghu Islands, Maccesfield Bank, the Paracel Islands, and the Spratly Islands.[254] The law provides China's military and law enforcement with a legal justification to defend its maritime claims. Passing domestic laws that specifically mention the disputed maritime territories by name is a form of exerting effective control over a maritime territory. It also helps that the 1992 Law specifically mentions the Senkaku Islands by name. As observed in the *Nicaragua v. Honduras* case, treaties and laws must specifically reference maritime territories by name or location. In the *Nicaragua v. Honduras Case*, the passage of three Honduran constitutions vaguely referencing the disputed islands was not enough to convince the court that Honduras had jurisdiction over its disputed islands.[255]

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252 Cheng, "Winning Without Fighting," 4.

253 Stefan Halper, "China: The Three Warfares" (University of Cambridge, May 2013), 14, http://images.smh.com.au/file/2014/04/11/5343124/China_%2520The%2520three%2520warfares.pdf?rand=1397212645609.

254 People's Republic of China, "Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone," February 25, 1992.

255 *Nicaragua v. Honduras*, 58.

China's controversial interpretation of UNCLOS and its staunch defense of that interpretation (through the use of the Nine Dash Line) may best represent China's use of legal warfare in an international agreement. China has exploited ambiguities in UNCLOS, such as the definition between an island and a rock, to name one very important example. As discussed in Chapter II, an island is "a naturally formed area of land, surrounded by water, which is above water at high tide."[256] Islands are entitled a 12 nautical mile territorial sea and a 200 nautical mile exclusive economic zone. On the other hand, a rock is defined as a geographic feature that rises above the water at high-tide. Rocks are unable to "sustain human habitation or economic life of their own."[257] A rock is only entitled a 12 nautical mile territorial sea. UNCLOS does not clearly define what constitutes "human habitation" or "economic life," and these vague terms are subject to interpretation and debate. Does the term "human habitation" mean humans can live on an insular feature for one day or 365 days? Does "human habitation" include the artificial expansion (or reclamation) of rocks to support long term habitation? Does "human habitation" on rocks allow inhabitants to use advances in technology such as solar energy and desalination plants for long term settlement? Does "economic life" mean the insular feature can generate one dollar or one billion dollars in revenue? Does it mean it must generate money for one day or 365 days? Carlos Ramos-Mrosovsky put it best by saying, "international regimes have 'vested otherwise worthless islands with immense economic value."[258] Interpreting a rock as an island can entitle a coastal state to an additional 125,000 square nautical miles of exclusive economic zone. Therefore states have an incentive to interpret rocks as islands. This liberal interpretation of rocks versus islands in UNCLOS is another rationale and interpretation of China's Nine Dash Line. China takes a stance that many of its claimed maritime features within the Nine Dash Line are islands and not rocks. Therefore, because of China's liberal UNCLOS

256 United Nations, "UNCLOS."

257 Ibid.

258 Carlos Ramos-Mrosovsky, "International Law's Unhelpful Role in the Senkaku Islands," *University of Pennsylvania Journal of International Law* 29, no. 4 (2009): 906.

interpretation the line could represent the 200 nautical mile EEZ from all of China's claimed islands.[259]

Chinese legal warfare could potentially use judicial law to justify its actions. As discussed in Chapter II, trends in the ICJ and PCA emphasizing the use of effective control to decide cases creates the unintended consequence of promoting the continued demonstration of effective control. The pursuit of effective control can lead to potential conflict among states competing to demonstrate effective control over the same maritime claim.[260]

Legal warfare is not limited to domestic laws, international laws, and law enforcement, Dean Cheng adds legal warfare can include the use of, "legal experts – both military lawyers and a cadre of internationally recognized legal scholars – whose opinions will carry influence abroad as well as at home."[261] The use of scholars was also echoed by Sangkuk Lee when he observed Chinese foreign propaganda, "conduct[s] public diplomacy [through] exchanges and contacts with local think-tanks, commercial circles, [and] academia…"[262] The use of legal experts merge legal warfare with media and propaganda warfare. Legal experts provide credible legal justifications to the media to legitimize Chinese actions. Chinese propaganda proliferates the expert opinions to provide legitimacy to the world. As in the case with the Nine Dash Line, sometimes the legal experts will use quasi-legal arguments to justify China's claim to its maritime disputes. One example of a quasi-legal arguments is that the Nine Dash Line and the

259 Beckman, "The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea," 149–153; Jonathan Charney, "Rocks That Cannot Sustain Human Habitation," *The American Journal of International Law* 93, no. 4 (October 1999): 863–877; Drifte, "The Senkaku/Diaoyu Islands Territorial Dispute," 22–24; Dupuy and Dupuy, "China's Historic Rights in the SCS," 127–128; Franckx and Benatar, "Dots and Lines," 101–102; Gao and Jia, "Nine-Dash Line in the SCS," 98, 119.

260 Sumner, "Territorial Disputes at the ICJ," 1810.

261 Cheng, "Winning Without Fighting," 6.

262 Sangkuk Lee, "China's 'Three Warfares': Origins, Applications, and Organizations," *Journal of Strategic Studies* 37, no. 2 (April 17, 2014): 214.

Sino-centric view of the world are well founded in customary international law.[263] As discussed in the last chapter, the legal basis for the Nine Dash Line is filled with holes.[264]

The overwhelming majority of legal scholars who justify China's claim to the Nine Dash Line using the Sino-centric historic waters argument are Chinese.[265] Some of these scholars are affiliated with western universities. Others are associated with Chinese academic institutions. The Chinese authors rely on their professional credibility and the credibility of the scholarly journals in which they write in order to forward a quasi-legal argument.

Legal Warfare and International Relations

With an initial understanding of legal warfare it is relevant to identify which IR frameworks account best for legal warfare. Legal warfare uses international laws, so superficially it might appear it fits into a liberal institutionalist framework. However, legal warfare can be used to justify actions outside of international law. The "unlawful combatant" example above is one instance where international laws and norms did not constrain U.S. behavior. Offensive and defensive realism pay little attention to the value of international law unless it can favor the state. Legal warfare is definitely a tool that uses law to favor a state. In offensive realism, legal warfare can disguise or justify a state's power seeking behavior. Legal warfare can justify defensive realist behavior as long as it does not create balancing or security dilemmas. The English School of realism describes how states adhere to international law and stray from international law when

263 Zhiguo Gao and Bing Bing Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications," *The American Journal of International Law* 107 (2013): 101–105; Hong Nong, "Interpreting the U-Shape Line in the South China Sea," *China US Focus*, May 15, 2012, http://www.chinausfocus.com/peace-security/interpreting-the-u-shape-line-in-the-south-china-sea/; Zhang Haiwen, "Indisputable Sovereignty: Opposition to China's Ocean Claim Is Poorly Supported," *Beijing Review*, June 7, 2011, http://www.bjreview.com.cn/Cover_Stories_Series_2011/2011-06/07/content_380993.htm.

264 Larry M. Wortzel, *The Chinese People's Liberation Army and Information Warfare* (Carlisle, PA: U.S. Army War College Press, 2014), 30.

265 Zou Keyuan, "Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?," *IBRU Boundary and Security Bulletin* 7, no. 2 (1999): 71–81; Nong, "Interpreting the U-Shape Line in the South China Sea"; Li Mingjiang, "Reconciling Assertiveness and Cooperation? China's Changing Approach to the South China Sea Dispute," *Security Challenges* 6, no. 2 (Winter 2010): 49–68; Haiwen, "Indisputable Sovereignty: Opposition to China's Ocean Claim Is Poorly Supported"; Gao and Jia, "Nine-Dash Line in the SCS."

they attempt to revise rules to suit them. Legal warfare is best explained by the English School. The final chapter will further examine how China's use of legal warfare conforms to the English School of Realism.

It can be argued that from an IR perspective legal warfare reduces the potential for lethal militarized conflict. Legal warfare uses law as an important tool to prevent military force or to use law enforcement in lieu of military force. It averts military force unless it is absolutely necessary and justified by international law. When war is necessary, it is done for legal reasons. However, if legal warfare is used nefariously, it can justify and disguise unlawful behavior that can be destabilizing. For example in Russia's 2014 annexation of Crimea, Russia justified its invasion of Crimea on the basis of international law. Russia argued that it was defending its ethnic Russian citizens, was invited by Ukrainian president Victor Yanukovych, and that its invasion was a response to a Crimean democratic referendum.[266]

C. CHINESE DEMONSTRATIONS OF LEGAL WARFARE IN THE SENKAKU ISLANDS, PARACEL ISLANDS, AND SCARBOROUGH SHOAL

Now that the definition and background of legal warfare has been established, this section will demonstrate China's use of legal warfare in the three case studies of the Senkaku Islands, Paracel Islands, and Scarborough Shoal. Typical Chinese demonstrations of legal warfare pertain in its efforts to demonstrate effective control. These efforts can be broken into three categories. First, when applicable, China will use forms of effective control that have traditionally been accepted by international tribunals. This includes the construction of public works. Second, China will use innovative forms of effective control that have a strong basis in legal decisions. For example, China uses an Air Defense Identification Zone to control airspace over the Senkaku Islands. Finally, China will use forms of effective control that international courts have historically seen

[266] John Balouziyeh, "Russia's Annexation of Crimea: An Analysis under the Principles of Jus Ad Bellum," *LexisNexis Legal Newsroom - International Law*, April 14, 2014, http://www.lexisnexis.com/legalnewsroom/international-law/b/international-law-blog/archive/2014/04/14/russia-s-annexation-of-crimea-an-analysis-under-the-principles-of-jus-ad-bellum.aspx; Marc Weller, "Analysis: Why Russia's Crimea Move Fails Legal Test," *BBC News Europe*, March 7, 2014, http://www.bbc.com/news/world-europe-26481423.

as inadequate. This third category of arguments do not follow international law or historic court precedence but they are nevertheless justified by using legal arguments. Examples are the use of maritime patrols around disputed territory, despite numerous judicial conclusions that naval patrols are not forms of effective control. Actions in this third category are interpreted by other nations as expansionist or escalatory despite being justified by a legal argument. Furthermore, these examples show how China attempts to revise the rules of how sovereignty is determined which supports an English School argument. Or, these examples could be non-lethal power seeking behavior conducted under the guise of international law.

1. Senkaku Islands

As argued in Chapter III, Japan's sustained demonstration of effective control constitutes a strong case in favor of Japanese ownership of the Senkaku Islands. Without *de facto* control of the Senkaku Islands, China is in a disadvantaged situation to exert effective control over the island. In fact Japan does not even acknowledge the existence of a dispute over the Senkaku Islands. In light of its legal disadvantage, China aims to exert effective control around the Senkaku Islands by using Coast Guard patrols and establishing an Air Defense Identification Zone. The probable intent of China's behavior could be to force Japan to acknowledge the existence of a dispute for potential diplomatic resolution. The possible legal warfare objective is to conduct actions that resemble the acts of a state demonstrating effective control over its own island.

a. Maritime Patrols

China conducts maritime patrols around the Senkaku Islands in its attempt to demonstrate effective control over the islands. The maritime patrols take place inside and outside the 12 nautical mile territorial sea surrounding the Senkaku Islands. According to the Chinese State Oceanic Administration, Chinese Coast Guard (CCG) vessels routinely patrol the Senkaku Islands, while Chinese media, report that the CCG patrol the Senkaku Islands approximately two to four times a month, with a total of 85 cruises around the

islands since Japan nationalized the Senkaku Islands in 2012.[267] Decisions in international law have maintained naval or maritime patrols do not constitute valid examples of effective control. In *Indonesia v. Malaysia* and *Nicaragua v. Honduras*, the courts found naval patrols in the surrounding waters did not constitute effective control. Only in *Nicaragua v. Colombia* was a naval patrol deemed to exert effective control. In this particular case, the patrol went ashore after conducting a port call on the island itself. In that case, the court found the patrol exerted effective control over land.[268]

b. The East China Sea Air Defense Identification Zone

In November 2013, China announced the creation of an East China Sea Air Defense Identification Zone (See Figure 5).[269] An ADIZ is an area of airspace, established by coastal states, outside of its territorial airspace (usually over water) that allows a state's air defense to identify potentially hostile aircraft prior to entry into sovereign airspace. ADIZs are unilaterally declared and not specifically covered by any international agreement or treaty.[270]

Yang Yujin, spokesman for the Chinese Ministry of National Defense clarified the official Chinese intent of the ADIZ in stating that, "the establishment of the East China Sea ADIZ is indisputable. It aims to safeguard the country's national sovereignty as well as territorial airspace safety, ensuring orderly flights."[271] Therefore the stated

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267 Xinhua, "China Urges Japan to Correct Error," *Xinhua*, September 11, 2014, http://news.xinhuanet.com/english/china/2014-09/11/c_133636482.htm; Tingting Wang, "Coast Guard in Business for One Year, Cruises Diaoyu Islands 34 Times - At Least 10 New 1000-Ton Coast Guard Vessels Enter Service - Expelled Multiple Vietnamese Commercial Vessels Infringing on Our Drilling Platforms - Maritime Search and Rescue Success Rate Increases to 96.8 Percent," *Fazhi Wanbao Online*, July 23, 2014, (hereafter cited as "PRC Coast Guard Patrols Senkaku Islands").

268 *Nicaragua v. Colombia*, 37.

269 Xinhua, "Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone."

270 David A. Welch, "What's an ADIZ? Why the United States, Japan, and China Get It Wrong," *Foreign Affairs*, December 9, 2013, http://www.foreignaffairs.com/articles/140367/david-a-welch/whats-an-adiz, (hereafter cited as "What's an ADIZ"); Ruwantissa Abeyratne, "In Search of Theoretical Justification for Air Defense Identification Zones," *Journal of Transportation Security* 5, no. 1 (March 2012): 93–94.

271 Yu Lintao, "The Hot Zone - China's Newly Announced Air Defense Identification Zone Over the East China Sea Aims to Shore Up National Security," *Beijing Review* 57, no. 49 (December 5, 2013), http://www.bjreview.com.cn/print/txt/2013-12/02/content_580743.htm.

Chinese intent of the ADIZ is to protect sovereignty and maintain aviation safety. However, a lot more can be interpreted from the ADIZ declaration.

The Chinese ADIZ encompasses the East China Sea and incorporates the Senkaku Islands (See Figure 5). The East China Sea ADIZ incited protest from Japan, South Korea, and the United States. The Japanese Foreign Ministry protested the Chinese ADIZ because it encompassed the Senkaku Islands.[272] South Korea also protested the ADIZ and reacted by enlarging its own ADIZ to incorporate Ieo Island, which it contests with China.[273] The United States protested the creation of China's ADIZ stating that it is an "attempt to change the status quo in the East China Sea."[274] Arguably the greatest concern to the security situation in East Asia is the fact that the Chinese ADIZ overlaps the Japanese and South Korean ADIZs. Overlapping ADIZs increase the opportunity for fighter aircraft from South Korea and China or Japan and China to interact and react to each other (see Figure 6). This interaction increases the chance for misinterpretation and unintended escalation between states. It should be noted both Japan and South Korea primarily protested the inclusion of contested islands as opposed to the overlap of the ADIZs themselves. Failure of Japan and South Korea to protest the inclusion could be perceived as acquiescence to China's claim in an international court of law.[275]

Some scholars (both western and Chinese) argue the East China Sea ADIZ is a reaction to the changing security situation in the East China Sea for three reasons. First, scholars argue it is necessary to protect the aerial sovereignty of China. Arguably the ADIZ is a mature reaction to regular U.S. reconnaissance flights off the coast of China. With a modernized air force, the People's Liberation Army Air Force now has aircraft

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[272] Ministry of Foreign Affairs (Japan), "Statement by the Minister for Foreign Affairs on the Announcement on the 'East China Sea Air Defense Identification Zone' by the Ministry of National Defense of the People's Republic of China," *Ministry of Foreign Affairs - Japan*, November 24, 2013, http://www.mofa.go.jp/press/release/press4e_000098.html.

[273] Eric Heginbotham, "China's ADIZ in the East China Sea," *Lawfare: Hard National Security Choices*, August 24, 2014, http://www.lawfareblog.com/2014/08/the-foreign-policy-essay-chinas-adiz-in-the-east-china-sea/, (hereafter cited as "China's ADIZ in the East China Sea").

[274] John Kerry, "Statement on the East China Sea Air Defense Identification Zone" (Department of State, November 23, 2013), http://www.state.gov/secretary/remarks/2013/11/218013.htm.

[275] Welch, "What's an ADIZ?"

(like the new *Su-27*, *J-10*, and *J-11*) that are capable of enforcing the ADIZ far from the Chinese mainland.[276]

Second, this was China's first ADIZ despite its being surrounded by countries, like Japan and South Korea, which have existing ADIZs. Japan's ADIZ was established in 1969 and covered the Senkaku Islands. South Korea's ADIZ was established in 1951, during the Korean War, and incorporates the southern portion of North Korea. China interprets the row caused by announcing its new ADIZ as a double standard where the United States and its treaty partners can have an ADIZ but China cannot.[277]

Third, although China insists the ADIZ is not directed against a particular country, the reality is its ADIZ abuts the ADIZs of two countries with security alliances with the United States. The ADIZ also touches Taiwan's ADIZ, a non-recognized state with an ambiguous security agreement with the United States (the Taiwan Relations Act). Therefore, in a security environment surrounded by U.S. allies, it is logical for China to take defensive steps to secure itself. China is within its right under international law to unilaterally declare an ADIZ.[278]

Despite the geopolitical and security justifications, legal scholars argue the Chinese ADIZ and its location, encompassing the Senkaku Islands, is a statement of sovereignty. Yang Yujin's statement from the Chinese Ministry of National Defense clarified the intent of the ADIZ was to defend sovereignty. Superficially the statement would imply the sovereignty of mainland China. However it might also mean Chinese sovereignty of the Senkaku Islands.[279]

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276 Lintao, "The Hot Zone - China's Newly Announced Air Defense Identification Zone Over the East China Sea Aims to Shore Up National Security"; Heginbotham, "China's ADIZ in the East China Sea."

277 Lintao, "The Hot Zone - China's Newly Announced Air Defense Identification Zone Over the East China Sea Aims to Shore Up National Security"; Heginbotham, "China's ADIZ in the East China Sea."

278 Lintao, "The Hot Zone - China's Newly Announced Air Defense Identification Zone Over the East China Sea Aims to Shore Up National Security"; Heginbotham, "China's ADIZ in the East China Sea."

279 Sam LaGrone and Dave Majumdar, "Making Sense of China's Move on Air Defense Zone," *The Straits Times*, November 28, 2013, http://www.straitstimes.com/the-big-story/asia-report/senkakudiaoyu-islands/story/making-sense-chinas-move-air-defence-zone-2013, (hereafter cited as "Making Sense of China's ADIZ").

As a demonstration of effective control, managing the air space above a disputed maritime claim is a demonstration to act as a sovereign. In the 1993 ICJ verdict *Nicaragua v. Honduras*, the court found the Honduran regulation of the airspace above disputed islands was a compelling demonstration of effective control. In 1993, the U.S. Drug Enforcement Administration (DEA) requested Honduran government permission to overfly four disputed islets to collect intelligence on drug traffickers. The court found Honduras' authorization for the DEA overflights constituted an act by a sovereign state to regulate the "national air space." Consequently the ICJ decided the effort to regulate air space was a relevant demonstration of effective control.[280]

By encompassing the ADIZ above the Senkaku Islands, China additionally demonstrates its intent to defend the Senkaku Islands. The intent to defend the islands is a demonstration of China's intent to govern the islands. Although this legal argument has not been used in an international court for a maritime claim, it is a potentially compelling legal justification. Therefore, the institution of an ADIZ over the Senkaku Islands, to both regulate national air space and to defend disputed Chinese territory may be a demonstration of effective control.[281] However, if China uses these legal arguments, Japan would rebut that it has maintained its ADIZ since 1969.

China has reinforced its ADIZ through action. Since China established its ADIZ, Japan has intercepted numerous Chinese People's Liberation Army Air Force (PLAAF) aircraft in the vicinity of the Senkaku Islands.[282] The Chinese National Defense Ministry confirmed this by stating, "China has the capability to conduct effective control over relevant airspace."[283] The phrase choice, "effective control over relevant airspace" includes three potentially significant concepts.[284] It combines elements of international

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280 *Nicaragua v. Honduras*, 60.

281 Keck, Zachary, "With Air Defense Zone, China Is Waging Lawfare," *The Diplomat*, November 30, 2013, http://thediplomat.com/2013/11/with-air-defense-zone-china-is-waging-lawfare/.

282 Ministry of Defense - Japan, "China's Activities Surrounding Japan's Airspace," *Ministry of Defense - Japan*, accessed October 24, 2014, http://www.mod.go.jp/e/d_act/ryouku/index.html.

283 Lintao, "The Hot Zone - China's Newly Announced Air Defense Identification Zone Over the East China Sea Aims to Shore Up National Security."

284 Ibid.

law ("effective control") with the existing Nine Dash Line justification and airspace. The 2009 *note verbale* justifying the Nine Dash Line stated the following:

> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. [285]

Weaving its way through the official Chinese statements for the Nine Dash Line is the similar argument justifying the ADIZ. Remembering Yang Yujin's Ministry of Defense statement, and Yun Lintao's statement, the reappearance of words like "relevant" and "indisputable" begs the question of whether China will claim an ADIZ encompassing the entire Nine Dash Line. This will be discussed more below.

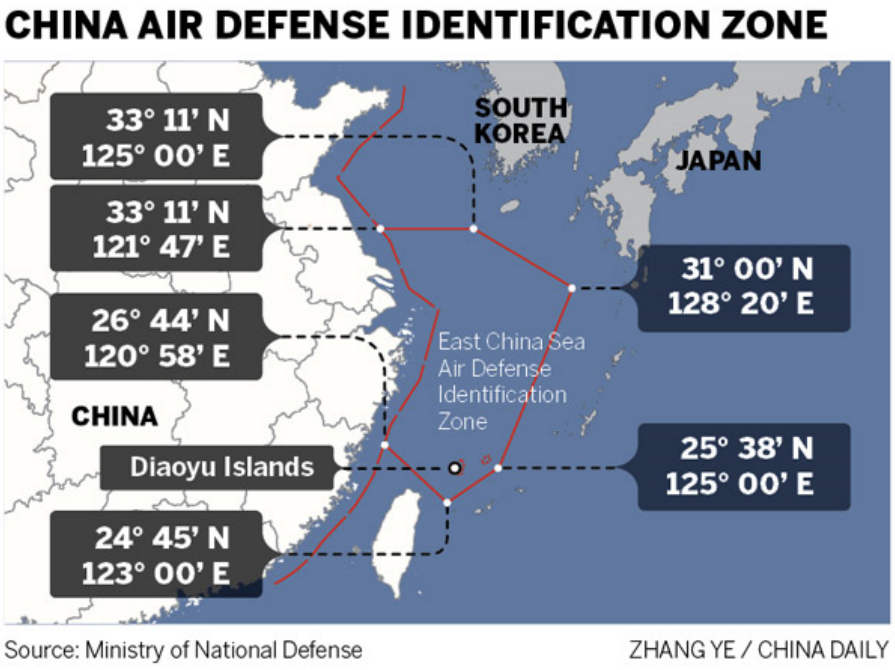

Figure 5. China's Air Defense Identification Zone (ADIZ)[286]

[285] Permanent Mission of the People's Republic of China to the United Nations, "Note Verbale (7 May 2009)," Note Verbale, (May 7, 2009).

[286] Xinhua, "Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone," *Xinhua*, November 23, 2013, http://news.xinhuanet.com/english/china/2013-11/23/c_132911635.htm.

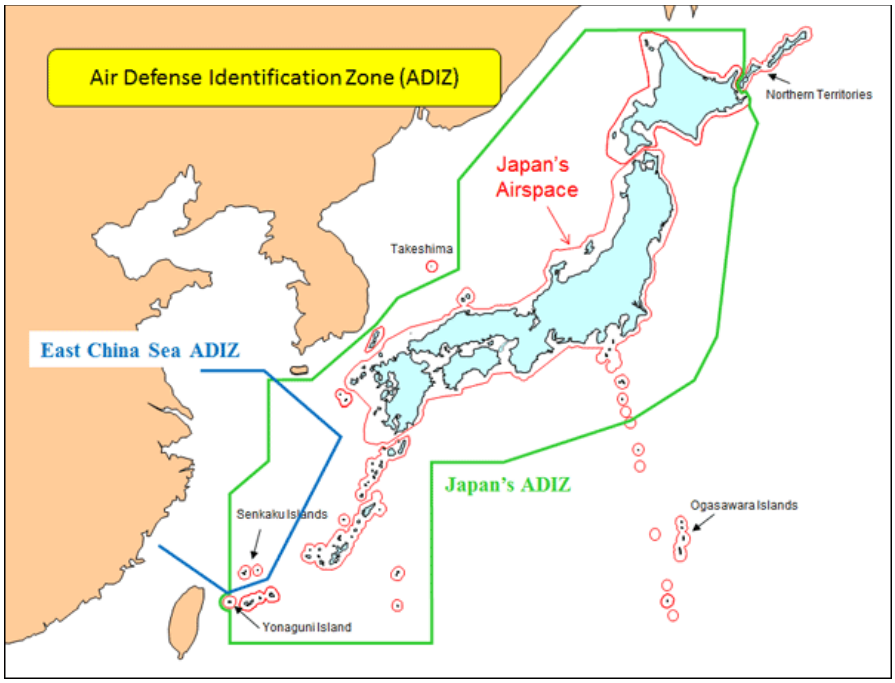

Figure 6. China's ADIZ overlapping with Japan's ADIZ[287]

c. The Overall Legal Warfare Strategy in the Senkakus

China is in a difficult position to demonstrate effective control on an island it does not maintain *de facto* control over. So why does China pursue maritime patrols and an ADIZ? The preponderance of legal precedence proves naval patrols do not generate effective control. Yet China still conducts maritime patrols. Additionally, China established an ADIZ knowing it would spark regional criticism. Therefore, it would seem the negative regional perception would outweigh the benefits of engaging in this controversial behavior.

The answer lies in the intricacies of the Senkaku dispute. To date, Japan refuses to acknowledge a dispute exists. Since Japan maintains *de facto* control over the Senkaku Islands, the Japanese Foreign Ministry is at liberty to make statements such as the following:

> There is no doubt that the Senkaku Islands are clearly an inherent part of the territory of Japan, in light of historical facts and based upon

[287] Ministry of Defense - Japan, "China's Activities Surrounding Japan's Airspace," *Ministry of Defense - Japan*, accessed October 24, 2014, http://www.mod.go.jp/e/d_act/ryouku/index.html.

> international law. Indeed, the Senkaku Islands are under the valid control of Japan. There exists no issue of territorial sovereignty to be resolved concerning the Senkaku Islands.[288]

Japan's claim sounds similar to China's claim to "indisputable sovereignty" in the South China Sea. China's use of maritime patrol vessels to penetrate the territorial seas around the Senkaku Islands as well as its declaration and enforcement of the ADIZ is a way for China to force Japan to admit a dispute exists over the islands.[289] As one Chinese legal scholar put it:

> China's public service ships and aircraft have implemented normalized patrol of the waters and airspace around the Diaoyu [Senkaku] Islands, undermining Japan's claim of exclusivity and thereby causing a complete turnaround in the situation of the Diaoyu Islands.[290]

Using legal warfare and forcing Japan to admit a dispute exists can be the first step in diplomacy (or legal proceedings if China would ever agree to them.) By engaging in behavior that resembles the actions of a sovereign, China could raise doubts in the international community that Japan owns the island. Or, China could raise tensions to the point that the options are either war or diplomacy because the escalated status quo is not sustainable. In either case, China casts doubts on Japan's "indisputable" claim to the islands.

On 7 November 2014, after a high level cabinet meeting between Japan and the PRC, a four point joint statement was released affirming continued bilateral relations between both countries. In addressing growing tensions over the Senkaku Islands, the carefully worded statement said the following:

> Both sides recognized that they had different views as to the emergence of tense situations in recent years in the waters of the East China Sea, including those around the Senkaku Islands, and shared the view that,

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288 Ministry of Foreign Affairs (Japan), "The Basic View of the Ministry of Foreign Affairs on the Senkaku Islands," *Ministry of Foreign Affairs - Japan*, May 8, 2013, http://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html.

289 Lintao, "The Hot Zone - China's Newly Announced Air Defense Identification Zone Over the East China Sea Aims to Shore Up National Security"; LaGrone and Majumdar, "Making Sense of China's ADIZ."

290 Zhang Qingmin, "Understanding Chinese Diplomacy since the 18th Party Congress," *Waijiao Pinglun*, March 5, 2014, 4, (hereafter cited as "Understanding Chinese Diplomacy").

> through dialogue and consultation, they would prevent the deterioration of the situation, establish a crisis management mechanism and avert the rise of unforeseen circumstances.[291]

This statement was hardly a breakthrough in Sino-Japanese relations. Both countries acknowledge there are "different views," however this does not mean Japan recognizes a dispute over the Senkaku Islands exists. It was telling that the Japanese version of the statement only used the Japanese name of the islands (Senkaku) and the Chinese version published in *Xinhua* only used the Chinese name of the islands (Diaoyu). In this case, the divisions in the translations still acknowledged the existence of a dispute. In the end, both states were willing to acknowledge ways to de-escalate tensions around the Senkaku Islands.[292]

2. Paracel Islands

The last section discussed China's use of legal warfare in Japan. This section will examine China's use of effective control and legal warfare in and around the Paracel Islands.

a. Demonstration of Effective Control on the Island

Demonstrations of effective control on the Paracel Islands are much easier for China in contrast to the Senkaku Islands. The last chapter discussed China has maintained *de facto* control over the islands ever since it occupied the Paracel Islands in 1974. China demonstrates effective control through public works which include the construction of an airstrip, port facility, hospital, library, and cell phone towers. As demonstrated repeatedly

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[291] Ministry of Foreign Affairs (Japan), "Regarding Discussions toward Improving Japan-China Relations," *Ministry of Foreign Affairs - Japan*, November 7, 2014, http://www.mofa.go.jp/a_o/c_m1/cn/page4e_000150.html.

[292] Tiezzi, Shannon, "A China-Japan Breakthrough: A Primer on Their 4 Point Consensus," *The Diplomat*, November 7, 2014, http://thediplomat.com/2014/11/a-china-japan-breakthrough-a-primer-on-their-4-point-consensus/; Zachary Keck, "Japan Has Not Recognized Senkaku Island Dispute," *The Diplomat*, November 11, 2014, http://thediplomat.com/2014/11/japan-has-not-recognized-senkaku-island-dispute/; Xinhua, "China, Japan Reach Four-Point Agreement on Ties," *Xinhua*, November 7, 2014, http://news.xinhuanet.com/english/china/2014-11/07/c_133772952.htm.

in the ICJ and PCA, state funded public works construction are examples of effective control.[293]

b. Demonstrations around the Island

Having established in the last chapter that China has provided ample evidence of on-island effective control, it is relevant to discuss off-island demonstrations of effective control. As discussed above, off-island effective control is generally considered irrelevant by the courts. Naval patrols, that do not touch land, have no bearing on supporting an effective control legal claim. Concurrently, law enforcement surrounding the islands, to include restricting fishing, does not support an effective control legal claim. However, this has not stopped China from restricting fishing and using maritime law enforcement. Since 1999, China has instituted a fishing ban throughout the claimed Nine Dash Line. This ban affects both Vietnamese and Philippine fishing within the South China Sea.[294] In 2012, China arrested 21 Vietnamese fishermen near the Paracel Islands. The fishermen were accused of violating the Chinese fishing ban and exploiting resources within the Chinese EEZ.[295] As recently as June and July of 2014, Chinese Coast Guard intercepted and deported Vietnamese fishermen sailing in Chinese-claimed waters.[296]

Oil exploration in the waters surrounding a disputed maritime claim can be perceived as escalatory. To be sure, it is the only way to verify and estimate the size of hydrocarbon resources beneath the seabed. However, in international courts, oil exploration is not legally a basis for demonstrating effective control on land. (For example, *Eritrea v. Yemen* and *Nicaragua v. Honduras* concluded government

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293 Michael Bristow, "China to Build School in Contested Paracel Islands," *BBC News Asia*, June 15, 2014, http://www.bbc.com/news/world-asia-27856082. For more on demonstrations of effective control see the following cases: *El Salvador versus Honduras* (health care, schools, electrical infrastructure), *Eritrea versus Yemen* (construction and maintenance of lighthouses), Qatar versus Bahrain (construction of a navigational aid), *Indonesia versus Malaysia* (construction and maintenance of lighthouses), *Nicaragua versus Colombia* (construction and maintenance of lighthouses and construction of a naval outpost), *Nicaragua versus Honduras* (construction of public works to support oil exploration)

294 Hunt, "Fishing Ban."

295 Voice of America, "China Defends Arrest of Vietnamese Fishermen near Disputed Islands," *Voice of America*, March 22, 2012, http://blogs.voanews.com/breaking-news/2012/03/22/china-defends-arrest-of-vietnamese-fishermen-near-disputed-islands/.

296 Wang, "PRC Coast Guard Patrols Senkaku Islands," 2.

sanctioning of offshore oil exploration alone was not a demonstration of on-island effective control.) However, China has repeatedly cited international law as a reason to conduct oil exploration or to deny another claimant's oil exploration.

Some of the most frequent examples of oil exploration occurred in the disputed waters between Vietnam and China. In Gulf of Tonkin and the waters south of China's Hainan Island, the EEZ of both China and Vietnam overlap. In 1997, Chinese mobile oil platform Kantan-3 conducted exploratory drilling in the Gulf of Tonkin based on China's EEZ south of Hainan Island. Vietnam vehemently protested the drilling.[297] Years later in 2011 and 2012, Chinese patrol boats and fishing vessels harassed the Vietnamese oil and gas survey vessel *Binh Minh 2* because the vessel was conducting economic activities within China's perceived EEZ. The incidents devolved into Chinese vessels cutting the *Binh Minh 2*'s survey equipment cables.[298] In 2014, Chinese state owned mobile oil platform *HD-981* conducted exploratory drilling in the Gulf of Tonkin. Unlike the Kantan-3 incident, the Vietnamese reaction here was more virulent. The Chinese Coast Guard attempted to defend *HD-981* using water cannons. According to Chinese press, a Vietnamese Coast Guard ship collided with Chinese Coast Guard vessel 46015. The incident eventually climaxed with riots against Chinese businesses in Vietnam. Yet these incidents are much ado about nothing. Instead of providing more legal support for the Paracel Islands (or even the Spratly Islands), China's state backed oil exploration and law enforcement actions do not provide any on-island demonstrations of effective control. The behavior can be explained as power seeking and expansionist by engaging in

297 Alexander L. Vuving, "Strategy and Evolution of Vietnam's China Policy: A Changing Mixture of Pathways," *Asian Survey* 46, no. 6 (December 2006): 815; Phan Phuong Nguyen, "Vietnam-China: Oil Search Heats up Tension in South China Sea," *Inter Press Service*, March 21, 1997, http://www.ipsnews.net/1997/03/vietnam-china-oil-search-heats-up-tension-in-south-china-sea/.

298 Bloomberg News, "PetroVietnam CEO Says Chinese Ships Cut Cables 'By Accident,'" *Bloomberg News*, December 4, 2014, http://www.bloomberg.com/news/2012-12-04/petrovietnam-ceo-says-chinese-ships-cut-cables-by-accident-1-.html; Bloomberg News, "Vietnam Says Chinese Boat Harassed Survey Ship; China Disputes," *Bloomberg News*, June 9, 2011, http://www.bloomberg.com/news/2011-06-05/china-reassures-its-neighbors-after-clashes-over-claims-in-south-china-sea.html; BBC, "Vietnam Accuses China in Seas Dispute," *BBC News Asia*, May 30, 2011, http://www.bbc.com/news/world-asia-pacific-13592508.

escalatory behavior in Vietnam's EEZ. Or, China's behavior is once again attempting to redefine how sovereignty is determined in the South China Sea.[299]

3. Scarborough Shoal

As discussed in the last chapter, the Philippines's legal claim to Scarborough Shoal is slightly stronger than China's claim because the Philippine Navy planted a flag on the largest rock in the shoal in 1997. Just as China conducts legal warfare by conducting a maritime patrol in the vicinity of the Paracel Islands, the Philippines are do the same in the vicinity of Scarborough Shoal. The Chinese maritime patrol prevents the Philippine vessels from conducting resource exploitation around the shoal. The Chinese patrols also prevent further demonstrations of effective control on the surfaced rocks. The recent flare-up started in 2012 when the Philippine warship *BRP Gregorio del Pilar* boarded Chinese fishing vessels inside the lagoon at the center of Scarborough Shoal. The Philippine Navy found captured marine life onboard the Chinese fishing vessels, which violated the Philippine EEZ. Two Chinese maritime law enforcement vessels arrived at the shoal and prevented the *BRP Gregorio del Pilar* from arresting the Chinese fishermen.[300] In a legal warfare move attempting to demonstrate that the Philippines was in violation of international law, Li Jie, a Chinese scholar from the Chinese Naval Research Institute, argued the Philippines escalated the situation by sending a warship to handle a fishery dispute. He stated the response "is not in line with international laws and the UN Convention on the Laws of the Sea."[301] Later in 2012, China constructed concrete barriers connected with heavy ropes blocking the lagoon entrance from shallow

299 Wang, "PRC Coast Guard Patrols Senkaku Islands," 2.

300 Jason Miks, "China, Philippines in Standoff," *The Diplomat*, April 11, 2012, http://thediplomat.com/2012/04/china-philippines-in-standoff/; Associated Press, "Philippine Warship in Standoff with China Vessels," *The Guardian*, April 10, 2010, http://www.theguardian.com/world/2012/apr/11/philippines-china-stand-off-south-china-sea, (hereafter cited as "Philippine Warship in Standoff with China Vessels").

301 Miks, "China, Philippines in Standoff."

draft vessels.[302] As mentioned in the Parcel Islands section above, these demonstrations of off-rock effective control do nothing to support China's legal case. Although China could argue these demonstrations of maritime effective control support a Sino-centric historic waters argument, this will likely prove to be inconsequential in an international court of justice.

According to one Chinese scholar, however, the Scarborough Shoal incident was a watershed moment of maritime legal warfare:

> China has vigorously protected sovereignty and rights of the sea and has introduced the new mode of maritime rights protection. For example, in terms of the Huangyan Island [Scarborough Reef] issue, China has adopted non-military means to practically protect China's rights of the sea, fighting back against the brazenness of the Philippines and forming the "Huangyan Island Model."[303]

To augment its available forces to conduct legal warfare using the "Huangyan Island Model," the Chinese Coast Guard received ten brand new 1000-ton Coast Guard Vessels in 2014. According to the website of the China Shipbuilding Industry Corporation, the company will deliver increasingly larger and longer-deployable Coast Guard vessels. The website shows it will deliver a 4000-ton class and a 10,000-ton class vessel to the Chinese Coast Guard.[304]

Two western scholars have an alternative offensive realist based opinion of the "Scarborough Model." In their view, the Scarborough Model utilized power and intimidation against the weaker Philippines. In his article, "A Plan to Counter Chinese Aggression," Ely Ratner argues the Scarborough Model was an "extraordinary act of coercion."[305] Patrick Cronin described the Philippines' dilemma, where it could "escalate

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[302] Mark E. Rosen, *Philippine Claims in the South China Sea: A Legal Analysis*, CNA Occasional Paper (Arlington, VA: CNA Corporation Strategic Studies, August 18, 2014), 17, http://www.cna.org/research/2014/philippine-claims-south-china-sea; Associated Press, "Filipino Fishermen Pay Price as China Ropes off Disputed Scarborough Shoal," *South China Morning Post*, May 23, 2013, http://www.scmp.com/news/asia/article/1243692/filipino-fishermen-pay-price-china-ropes-disputed-scarborough-shoal.

[303] Zhang, "Understanding Chinese Diplomacy," 4.

[304] Wang, "PRC Coast Guard Patrols Senkaku Islands," 3.

[305] Ratner, "A Plan to Counter Chinese Aggression."

and risk a violent run-in with the Chinese Navy, or stand down and negotiate with Beijing from a position of weakness."[306] The Scarborough Model tests the limits of what China can get away with by using low intensity conflict justified in international law. In this case, offensive realism was used and China's intentions were justified using legal warfare.

D. OTHER DEMONSTRATIONS OF LEGAL WARFARE – CHINESE ARTIFICIAL ISLANDS

As shown in the last section, China uses legal warfare in the Senkaku Islands, Paracel Islands, and Scarborough Shoal. China also uses legal warfare in other capacities related to its maritime disputes. This section will focus on examples of Chinese legal warfare outside of the three case studies. China conducts legal warfare in the South China Sea by applying an effective control argument to the waters and airspace contained within the Nine Dash Line. This section will discuss how China supports its maritime claim through the reclamation of shoals to create islands.

China goes to great length to consolidate its legal claim to the South China Sea. Within the Nine Dash Line China has also begun major maritime reclamation projects. These massive reclamation projects convert low-tide elevations or submerged features (like reefs and shoals) into habitable island installations to bolster China's claim to the South China Sea.

As observed in a recent BBC article, China has created five new "islands."[307] China has transported earth-moving equipment onto Johnson South Reef (site of the 1988 Chinese skirmish over Vietnam) to convert the reef into an outpost. A Philippine press outlet reports that the China State Shipbuilding Corporation has posted plans to convert the reef into a major military outpost that includes a port facility and a runway to support aircraft. According to the article, 30 to 74 hectares of the reef are to be reclaimed to

[306] Cronin, "Muddy Waters."

[307] Wingfield-Hayes, "China's Island Factory."

create an artificial island.[308] Imagery analysis shows construction on Gaven Reefs, Johnson South Reef, Cuateron Reef, Kennan Island, and Burgos islands.[309] The construction is conducted by a Chinese ship named the *Tian Jing Hao*. This vessel is a 6,000-ton dredger and is believed to be the largest ship of its type in East Asia; it has the ability to suction sand and sediment to create islands similar to the man-made islands created in Dubai, United Arab Emirates.[310]

The spokeswoman for China's Foreign Ministry, Hua Chunying, stated the construction is in accordance with China's position that it maintains "indisputable sovereignty over the Nansha Islands and the adjacent waters, and China's activities on relevant islands and reefs of the Nansha Islands fall entirely within China's sovereignty and are totally justifiable."[311] When asked if the construction was for military or civilian use the foreign minister replied the construction is to "improve[e] the working and living conditions of people stationed on these islands."[312] This was a peculiar statement since prior to the construction, no island existed nor was human habitation possible. Furthermore, it is not clear whether people were voluntarily living on the island or

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308 Joel Guinto, "China Building Dubai-Style Fake Islands in South China Sea," *Bloomberg News*, June 10, 2014, http://www.bloomberg.com/news/2014-06-10/china-using-dubai-style-fake-islands-to-reshape-south-china-sea.html; BBC, "China Says South China Sea Land Reclamation 'Justified,'" *BBC News*, September 10, 2014, http://www.bbc.com/news/world-asia-china-29139125; Camille Diola, "Closer Look at the Reclamation, Outpost on Mabini Reef," *The Philippine Star*, May 16, 2014, http://www.philstar.com/headlines/2014/05/16/1323840/closer-look-reclamation-outpost-mabini-reef; Diola, Camille, "Designs of China's Planned Base on Mabini Reef Surface," *The Philippine Star*, June 4, 2014, http://www.philstar.com/headlines/2014/06/04/1330967/designs-chinas-planned-base-mabini-reef-surface.

309 Lindsay Murdoch, "Photos Reveal China Building on Reefs in Disputed Waters," *The Sydney Morning Herald*, September 15, 2014, http://www.smh.com.au/world/photos-reveal-china-building-on-reefs-in-disputed-waters-20140915-10h4r0.html; Hardy, James and Sean O'Connor, "China Builds Another Island in South China Sea," *IHS Jane's 360*, September 30, 2014, http://www.janes.com/article/43757/china-builds-another-island-in-south-china-sea; Shannon Tiezzi, "Why Is China Building Islands in the South China Sea?," *The Diplomat*, September 10, 2014, http://thediplomat.com/2014/09/why-is-china-building-islands-in-the-south-china-sea/.

310 Guinto, "China Building Dubai-Style Fake Islands in South China Sea"; "Tian Jing Hao," *Dredgepoint.org*, October 2, 2014, https://www.dredgepoint.org/dredging-database/equipment/tian-jing-hao.

311 Hua Chunying, "Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on September 9, 2014," *Ministry of Foreign Affairs - PRC*, September 9, 2014, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1189470.shtml.

312 Ibid.

"stationed" on the island. When pressed for clarification Hua Chunying replied, "I have already answered your question."[313]

Based on what Foreign Ministry spokeswoman Hua Chunying did state, China intends to adhere to its Sino-centric historic waters argument evident in its Nine Dash Line to justify its island reclamation. As discussed at length in the last chapter, this Nine Dash Line argument using customary international law is flawed. Nevertheless, the construction of islands is a relevant subject to examine in international law. Can China construct islands to generate a territorial sea, an exclusive economic zone, and demonstrate effective control?

UNCLOS does state that the coastal state is within its right to construct artificial islands within its EEZ. UNCLOS Article 56 and 60 declare the coastal state can construct artificial islands for the purposes of exploiting resources in the EEZ.[314] One key assumption China makes by investing and constructing these artificial islands is that the construction takes place within its EEZ. Until external intervention or an international court says otherwise, China can continue to make this assumption and continue construction.

However, do artificial islands entitle China to a territorial sea and exclusive economic zone? In examining UNCLOS it is clear that artificially constructed islands on former low-tide elevations or submerged features cannot be considered islands.[315] UNCLOS clearly states:

> Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.[316]

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313 Ibid.

314 United Nations, "UNCLOS," 45.

315 Alex G. Oude Elfernik, "The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?" *Ocean Development & International Law* 32 (2001): 169–90.

316 United Nations, "UNCLOS," 45.

Therefore if UNCLOS stipulates artificial islands do not generate a territorial sea and EEZ, why does China persist with building the islands? The answer is parallel to China's justification in using maritime patrols to produce effective control. It is an effort to bolster the Chinese claim to the area within the Nine Dash Line based on a Sino-centric historic waters legal argument. China's use of a quasi-legal argument provides evidence it is trying to redefine how sovereignty is determined. Additionally, a controversial and self-serving interpretation of UNCLOS shows China is also redefining how the treaty applies to them. Therefore, based on the attempt to revise legal norms, the English School of Realism is a framework that potentially explains China's behavior.

Aside from international law, a problem China faces with its island reclamation program is that it arguably violates China's-ASEAN's 2002 Declaration on the Conduct of Parties in the South China Sea. In China's-ASEAN's declaration, Article V clearly states:

> The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.[317]

It is difficult for China to argue submerged maritime features were already populated. Therefore the conversion of submerged features to habitable islands makes China's behavior a possible violation of the 2002 Declaration on the Conduct of Parties in the South China Sea. This behavior certainly works against China's behavior fitting into a liberal instituionalist framework.

The artificial island creation could also be explained by an offensive realist explanation. Similar to the realist interpretation of the Scarborough Model, the island construction could be low intensity power-seeking behavior disguised by international law. This framework certainly explains why China was dismissive of China's-ASEAN's Declaration.

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[317] ASEAN, "Declaration on the Conduct of Parties in the South China Sea" (ASEAN, November 4, 2002), http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea.

E. WHAT CHINA CAN DO TO STRENGTHEN ITS LEGAL CLAIM

The above examples demonstrate two Chinese views of international law. One view is that China has an, albeit flawed, understanding of international law and how to strengthen its legal claims. An alternative view is China is power-seeking and irredentist but uses international law to disguise its behavior. It appears that Chinese decision makers understand the relevance of effective control. In their 2014 "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines," paragraph 11 of section two goes into detail about the relevance of effective control. The paragraph even cites some of the court decisions mentioned in Chapter II. However the Chinese argument in the position paper focuses more on why the arbitration has no legal authority to render a verdict. Additionally the position paper fails to address how China ever exerted effective control over its claims in the South China Sea.[318]

What can China do to strengthen its legal claims based on successful demonstrations of effective control in international courts? China could initiate a campaign to strengthen its legal claims on every maritime feature throughout the South China Sea by using effective control.

1. Markers and Flags

As the *Island of Palmas* case concluded, flags and markers are legally recognized demonstrations of effective control. China can plant flags and hardened markers throughout the South China Sea. Although inexpensive, the longevity and visibility of hardened stone markers could be indefinite. In at least one case, China left a marker. At James Shoal, a low tide elevation disputed between China and Malaysia on the southern tip of the Nine Dash Line, a Chinese Marine Surveillance Vessel approached the submerged feature and, "several officers of the ship threw a sovereignty stele into the

[318] People's Republic of China, "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines" (People's Republic of China, December 7, 2014), http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

water."[319] China could hypothetically go to every island, rock, and low tide elevation and drop heavy marble steles.

2. Lighthouses

As observed in *Eritrea v. Yemen*, *Indonesia v. Malaysia*, *Nicaragua v. Colombia*, and *Malaysia v. Singapore*, the construction and maintenance of lighthouses are a legally recognized demonstration of effective control. Aside from planting flags and creating markers, the construction and maintenance of lighthouses can be an even more relevant form of effective control. Under the auspices of maritime safety, China could construct lighthouses on islands and rocks throughout the Nine Dash Line claim.

3. An ADIZ over the Nine Dash Line

Similar to the ADIZ over the Senkaku Islands, China could establish an ADIZ over its claimed islands in the South China Sea. As argued earlier, in *Nicaragua v. Honduras*, regulating the overflight of aircraft demonstrates the intent to act as a sovereign.

4. What Prevents China From Doing This?

China could plant flags, construct markers, build lighthouses, and enforce and ADIZ over the South China Sea, but why does it refrain? One answer is that it costs a lot of money. The cost to deploy construction teams and accompanying security to the numerous Chinese South China Sea islands would be expensive. It would be free to declare an ADIZ but costly to enforce it. The cost in military aviation flight hours used to enforce an ADIZ far from mainland China would take its toll on the People's Liberation Army Air Force (PLAAF) and People's Liberation Army Navy Air Force (PLANAF). However, the long-term economic benefit of establishing a marker or building a lighthouse may outweigh the short-term initial expense of building a maker.

Second, China may not have logistics to construct and maintain lighthouses throughout the South China Sea. Yet, as demonstrated with the massive reclamation

[319] Zheng Wang, "The Nine-Dashed Line: 'Engraved in Our Hearts,'" *The Diplomat*, August 25, 2014, http://thediplomat.com/2014/08/the-nine-dashed-line-engraved-in-our-hearts/.

project mentioned above, as well as the numerous Coast Guard Vessels China uses to enforce its maritime claims, China could construct markers and lighthouses if it wanted to. On the other hand, the PLAAF may not have the operational capability to sustain extended detachments on far-flung air strips in the South China Sea. The most developed air base is on Woody Island of the Paracel Chain. Woody Island is far from the southeastern tip of the Nine Dash Line. However, as one author argues, the Woody Island air strip is the first step in establishing an ADIZ in the South China Sea. The Chinese aircraft carrier program is not currently in a position to defend Chinese airspace.[320] Third, coupled with the regional outcry and violations of China's-ASEAN's Declaration on the Conduct of Parties in the South China Sea, China may fear the potential escalation to armed conflict due to misinterpretation and miscalculation.

Third, the damage to Chinese regional relations would be extensive. Although its actions could be supported by the quasi-legal Nine Dash Line argument, tensions with claimant nations would be high. ASEAN's Declaration of Conduct would be in tatters. More importantly, this behavior could taint China as an expansionist revisionist power. The consequence could lead China's neighbors into security dilemmas and bandwagoning with the United States, which would inherently reduce China's security.

F. HOW CHINA'S COMPETITORS CONDUCT LEGAL WARFARE

Up to this point, this chapter has shown China goes to great lengths to demonstrate its effective control over its maritime claims through the use of legal warfare. However, this is only one side of the story. In many ways, China is reacting to an environment where other countries have already demonstrated effective control through public works construction on claimed maritime territories.

1. Japan

As described in the last chapter, Japan has assumed the control over a lighthouse built on Senkaku Island built by a Japanese nationalist group.[321] Prior to the construction

320 Peter Wood, "China's 'Eternal Prosperity': Is Island Expansion a Precursor to South China Sea ADIZ?" *China Brief* 14, no. 20 (October 23, 2014): 3–5.

321 Zhongqi Pan, "Diaoyu/Senkaku Islands: The Chinese Perspective," 74–76.

of the lighthouse, the prefectural government of Okinawa constructed markers in 1895 and 1969.[322] In 2012 Japan nationalized the island by purchasing them back from the Kurihara family. As noted in Chapter II, Japan initially leased then sold some of the Senkaku Islands to the Koga family. The Koga family later sold the islands to the Kurihara family.[323] In order to prevent the islands from being sold to the nationalistic and antagonistic Tokyo governor, Shintaro Ishihara, Japan purchased the islands. By purchasing the islands, Japan assumed the lesser of two evils. However, the move to nationalize the islands infuriated China. China responded by dispatching maritime and air patrols in the vicinity of the Senkaku Islands. Concurrently Japan maintains a Coast Guard presence and scrambles the Air Self Defense Force in reaction to Chinese interactions.[324] Every time a Chinese state vessel intrudes into the 12 nautical mile periphery of the Senkaku Islands, the Japanese Ministry of Foreign Affairs lodges a protest with the Chinese Ambassador to Japan. This protest is required to demonstrate Japan has not acquiesced its claim. Since 2012, these protests have become routine.[325]

Recognizing Japanese aims are parallel with Philippine aims, on 31 May 2014, Shinzo Abe promised to provide ten patrol vessels to the beleaguered Philippine Coast Guard. In the same statement, Abe alluded to a similar delivery of Coast Guard vessels to Vietnam. Japan's delivery of Coast Guard vessels attempts to level the legal warfare playing field in the South China Sea. Both the Philippines and Vietnam have a weak navy and coast guard compared to China.[326]

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322 Han-yi Shaw, *Senkaku Island Dispute - History and Analysis*, 13–14.

323 Ibid., 31–32.

324 Jane Perlez, "China Accuses Japan of Stealing after Purchase of Group of Disputed Islands," *The New York Times*, September 11, 2012, http://www.nytimes.com/2012/09/12/world/asia/china-accuses-japan-of-stealing-disputed-islands.html?_r=1&; Julian Ryall, "Japan Agrees to Buy Disputed Senkaku Islands," *The Telegraph*, September 5, 2012, http://www.telegraph.co.uk/news/worldnews/asia/japan/9521793/Japan-agrees-to-buy-disputed-Senkaku-islands.html.

325 Kyodo Clue IV, "Government Worried over Lack of Effective Measures; Number of Days When Chinese Government Ships Intruded into Japanese Territorial Waters Exceeds 80," *Kyodo Clue IV*, May 10, 2014, 2, http://clue4.kyodonews.jp.

326 Xinhua, "Japan's Abe Plays With International Law in Thinly Veiled Move," *Xinhua*, May 30, 2014, http://english.sina.com/world/2014/0530/705178.html.

a. Acknowledgement of a Dispute

If Japan maintains *de facto* control of a maritime claim, then Japan will not acknowledge a territorial dispute exists. However, if Japan does not maintain *de facto* control, then Japan acknowledges that a territorial dispute exists. For example, Japan refuses to acknowledge the existence of a territorial dispute in the Senkaku Islands. The Japanese Foreign Ministry calls the Senkaku Islands an "inherent part of the territory of Japan."[327] Unlike the Senkaku dispute, Japan acknowledges two territorial disputes. The first dispute is with South Korea over the Takeshima Islands (also known as Dokdo Island or Liancourt Rocks). The second dispute concerns the Northern Territories with Russia. These four islands lie northeast of the northern Japanese island of Hokkaido. In both cases, Japan does not maintain any *de facto* control over the disputed territories. Therefore it seems logical to conclude when Japan possesses *de facto* control of disputed maritime territory, then Japan declares there is no dispute. However, when Japan does not maintain *de facto* control, then Japan claims there is a maritime dispute.[328]

2. Vietnam

Vietnam occupies 27 islets in the South China Sea. As a reaction to the 1974 Battle of the Paracel Islands, Vietnam constructed outposts on the islands in order to defend its territory as well as strengthen its legal claim through effective control. Vietnam has surpassed all other Spratly Island claimants in the quantity of its occupied South China Sea islands. Although China's reclamation activities in the South China Sea looks escalatory, Vietnam was one of the first countries to fortify its islands. [329]

In order to protest China's fishing bans and oil exploration, Vietnam utilized its maritime law enforcement to counter Chinese maritime law enforcement. As described

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[327] Ministry of Foreign Affairs (Japan), "Japanese Territory - Senkaku Islands," *Ministry of Foreign Affairs - Japan*, April 15, 2014, http://www.mofa.go.jp/region/asia-paci/senkaku/index.html.

[328] Ministry of Foreign Affairs (Japan), "Japanese Territory - Takeshima," *Ministry of Foreign Affairs - Japan*, April 11, 2014, http://www.mofa.go.jp/region/asia-paci/takeshima/index.html; Ministry of Foreign Affairs (Japan), "Japanese Territory - Northern Territories," *Ministry of Foreign Affairs - Japan*, April 4, 2014, http://www.mofa.go.jp/region/europe/russia/territory/index.html.

[329] Sarah Raine and Christian Le Miere, *Regional Disorder: The South China Sea Disputes* (New York: Routledge, 2013), 33.

above, in 2014 Vietnamese Coast Guard vessels confronted Chinese law enforcement in the *HD-981* standoff. Nevertheless, Vietnam uses maritime law enforcement to enforce its maritime claims.

3. Philippines

Similar to Vietnam, the Philippines have occupied nine islets in the Spratly Archipelago. One of the occupied claims is a rusted-out tank-landing ship (*BRF Sierra Madre*) run aground on Second Thomas Shoal.[330] Second Thomas Shoal is a low tide elevation, however the presence of the *BRF Sierra Madre* arguably makes it an artificial island. The Philippines maintains a continual detachment of Marines on the *BRF Sierra Madre* in an attempt to defend the shoal. UNCLOS stipulates the coastal state is free to construct artificial islands within its 200 nautical mile EEZ. Second Thomas Shoal lies within the Philippine EEZ extending from Palawan Island. However the Philippine-claimed EEZ assumes there are no competing claims to the EEZ.[331]

Other instances of Philippine legal warfare include the use of international treaty law to forward its territorial claims. When ratifying UNCLOS in 1984, the Philippines reasserted its claim to the Spratly Islands. However, the Philippines did not specifically mention the Scarborough Shoal by name.[332]

The Philippines have used laws to enforce its claim to the Scarborough Shoal. As discussed above, in 2012 the Philippine warship *BRP Gregorio del Pilar* boarded Chinese fishing vessels to enforce the Philippine EEZ and prevented Chinese fishermen from exploiting the marine resources of the Scarborough Shoal.[333]

G. CONCLUSION

In summary, this chapter attempted to show China's use of legal warfare in its maritime disputes. Legal warfare uses laws to achieve a military or national objective.

330 Ibid.; Rosen, *Philippine Claims in the South China Sea: A Legal Analysis*, 19.

331 Rosen, *Philippine Claims in the South China Sea: A Legal Analysis*, 18–22.

332 United Nations, "UNCLOS."

333 Miks, "China, Philippines in Standoff"; Associated Press, "Philippine Warship in Standoff with China Vessels."

Legal warfare has three objectives. First, it shows how one's side obeys the law. Second, it shows how an adversary violates the law. Finally it justifies actions when one's side violates the law.[334] Chinese legal warfare is part of the "Three Warfares" strategy and is complemented by Media Warfare and Propaganda Warfare. When combined with the "Three Warfares," China seeks to legitimizes its actions and de-legitimize the actions of its adversaries. Chinese legal warfare includes the use of domestic and international law to justify its actions. It utilizes law enforcement to implement law. Legal warfare also utilizes quasi-legal arguments to justify its actions. Finally, legal warfare uses academic and legal experts to lend credibility to Chinese actions and its quasi-legal arguments.

In the context of the three case studies in the Senkaku Islands, Paracel Islands, and Scarborough Shoal, Chinese legal warfare is used in an attempt to generate effective control over its claims. In the Senkaku Islands, China's implementation of an Air Defense Identification Zone is a way to prove it maintains effective control over the island, even though it does not have *de facto* control on the island. Based on the *Nicaragua v. Honduras Case*, controlling the airspace above an island is a way to demonstrate effective control.

In the Senkaku Islands, Paracel Islands, and Scarborough Shoal, China uses maritime law enforcement vessels to demonstrate effective control in the territorial seas around the disputed maritime claims. However, as demonstrated in many ICJ and PCA court cases like *Eritrea v. Yemen*, *Indonesia v. Malaysia*, and *Nicaragua v. Honduras*, effective control must be demonstrated on land. Maritime patrols on the water do not provide effective control on land.

In the Paracel Islands, China's use of offshore oil exploration is another attempt to demonstrate effective control. However, as demonstrated in *Eritrea v. Yemen* and *Nicaragua v. Honduras*, oil exploration on the water do not demonstrate effective control over land. The use of maritime patrols and offshore oil exploration do not provide examples of effective control recognizable to an international court. Instead, China uses

334 Yanrong, "Legal Warfare: Military Legal Work's High Ground: An Interview with Chinese Politics and Law University Military Legal Research Center Special Researcher Xun Dandong," quoted in Cheng, "Winning Without Fighting," 2.

these maritime demonstrations of effective control to strengthen its quasi-legal argument supporting its historic waters claim to the Nine Dash Line and the greater South China Sea.

Outside of the three cases studies, China also attempts to use legal warfare in the Spratly Islands dispute. China's island-reclamation program in the South China Sea turns low-tide and submerged features into artificial islands. However, within UNCLOS, artificial islands do not generate a territorial sea or exclusive economic zone. Instead, the construction of the artificial islands are used to strengthen the quasi-legal argument based on historic waters claim to the Nine Dash Line.

China's use of legal warfare does provide some evidence it is constrained by international law and governs its behavior. Although controversial, China cites international law in its actions on or around its disputed maritime claims. On the Paracel Islands, China provides clear and unambiguous examples of effective around the islands through the construction of public works and peaceful administration of the population. China also uses maritime law enforcement to administer its domestic laws in the seas around its maritime claims in lieu of naval force.

Legal warfare also utilizes quasi-legal arguments. China uses many quasi-legal arguments in its maritime disputes. The most prominent quasi-legal argument is the legal justification for the Nine Dash Line. The Chinese justification to the Nine Dash Line is based on a Sino-centric historic waters argument rooted in customary international law. However, sovereignty over land using effective control is a stronger legal precedence backed up by years of customary international law. China's repeated use of the flimsy Sino-centric historic waters argument makes it a quasi-legal argument. This quasi-legal argument justifies its fishing ban throughout the Nine Dash Line and the conversion of low-tide elevations or submerged features into artificial islands.

Throughout this chapter various uses of Chinese legal warfare could be explained by both offensive realism and the English School of Realism. ADIZ implementation, the occupation of the Scarborough Shoal, or artificial island construction could be explained by power seeking offensive realist behavior. However, the 2014 law enforcement clashes

over maritime disputes provide examples of some constraint within international law and question the applicability of offensive realism. Why are non-lethal tactics used? Why are coast guard vessels clashing and not naval combatants? What prevents China from retaking claimed islands within the Nine Dash Line? On the surface these questions raise doubts offensive realism is the best IR frameworks to explain China's behavior in its maritime disputes. However, these answers could be explained by the use of legal warfare disguise irredentist Chinese behavior as law abiding. Perhaps China engages in low-intensity, take what it can get, offensive realism that uses legal warfare to disguise its expansionist intent.

Alternatively, the English School of Realism is an IR framework that can explain Chinese legal warfare. It is apparent that China respects rules of coexistence in its maritime disputes. The Senkaku Islands and many islands throughout the Spratly Islands are occupied by other claimants. China does not invade these islands even though it perceives it owns these islands. However, China seeks to revise international law and norms. For example, the continued use of the Sino-centric historic waters argument and legal warfare attempt to redefine how sovereignty is determined in China's maritime disputes. The final chapter will examine the four IR frameworks (offensive realism, defensive realism, the English School of Realism, and liberal institutionalism) and apply them to China's behavior in its maritime disputes. As the final chapter will show, China's use of legal warfare provides evidence that China's behavior in its dealings with maritime disputes is best explained by the English School of realism.

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V. CONCLUSION

A. INTRODUCTION

The beginning of this thesis asked whether China behaves within the confines of international law and which theory of international relations best explains China's behavior in its maritime disputes. Is China's behavior within the norms established in international law? To answer the first question, of whether China's behavior is within norms established in international law, this thesis investigated the norms associated with maritime disputes to determine if China behaved in accordance with those norms. To this end, the thesis investigated maritime dispute settlement in international law, China's maritime disputes, and its actions related to international law. The research concluded that China acts both within the law and outside of the law. For the most part, Chinese actions related to maritime disputes conform to international norms. However in other cases, which will be described in more detail below, China either redefines some norms or uses international norms and laws as a façade for self-interested behavior. After examining four IR theories (defensive realism, offensive realism, the English School of Realism, and liberal institutionalism) the thesis found China's use legal warfare provided evidence that offensive realism and the English School of Realism are two IR frameworks that explain China's behavior related to its maritime disputes. China's behavior is reflective of offensive realism because it acts in an irredentist manner while using legal warfare to disguise its true expansionist intent. The English School of Realism is another IR framework that describes Chinese behavior because China conforms to some international norms and laws while attempting to revise the internationally accepted way sovereignty is determined.

Chapter II examined the decisive factors that international courts used to decide maritime disputes, and concluded that effective control is the most important factor in determining disputed maritime sovereignty. The chapter analyzed all international court cases that decided sovereignty over an island or rock. An overwhelming majority of cases (nine out of ten) were decided by a demonstration of a state's effective control over the island or rock. Effective control is defined as the unambiguous exertion of state power in

a territory or population. In his 1928 decision over the Island of Palmas, Max Huber further clarified effective control as the "continuous and peaceful display of State authority during a long period of time."[335] Effective control can be demonstrated by providing examples of governance on a territory. The landmark 1933 case over the *Legal Status of Eastern Greenland*, established a very low bar for a state to demonstrate effective control due to the remote and uninhabited nature of disputed islands. Among the ten decisions analyzed, clear demonstrations of effective control included the construction of public works on the island, state sponsored health care for the population, law enforcement, and criminal prosecution. Weaker, yet valid, examples of effective control included the regulation of air space over an island, the regulation of turtle egg collection, and the promise of placing a lighthouse on a maritime feature. As Brian Taylor Sumner observes, the low bar for demonstrating effective control combined with the requirement to demonstrate effective control provide perverse incentives for states to engage in expansionist and imperialistic behavior.[336]

With an understanding that effective control was the primary means for establishing sovereignty over islands, Chapter III turned to examining three of China's maritime disputes. This chapter's case studies examined the dispute between China and Japan in the Senkaku Islands, the dispute between China and Vietnam in the Paracel islands, and the dispute between China and the Philippines over the Scarborough Shoal. Each case study attempted to examine both sides' sovereignty claim based on the demonstration of effective control. In the Senkaku Islands, Japan maintains *de facto* control over the islands. Some examples of Japanese effective control are the transfer and sale of one island in the chain from the Japanese government to a private citizen, the placement of sovereignty markers, the nationalization of the lighthouse on Senkaku Island, and repurchase of Senkaku Island from a private citizen back to the government of Japan. The Paracel Islands case is similar to the Senkaku Islands, however in this situation China has maintained *de facto* control over the islands since 1974. Examples of

[335] *Netherlands v. United States*, 869.

[336] *Denmark v. Norway*, 4; Brian Taylor Sumner, "Territorial Disputes at the International Court of Justice," *Duke Law Journal* 53 (2004): 1810.

Chinese on-island effective control are the construction public works, public health care, and stationing PLA forces on the islands. In the Scarborough Shoal, the Philippines demonstrated effective control in 1965 and 1997 by raising its flag on South Rock. Being that this maritime feature is mostly submerged it is difficult to exert effective control over the Scarborough Shoal. This physical limitation will prevent states from demonstrating strong forms of effective control on the rock.

Chapter IV argues that Chinese legal warfare is a way for China to attempt to demonstrate effective control in its maritime disputes as well as show it is a status quo power. Chinese legal warfare rests on three arguments. First, it shows how China obeys the law. Second, it shows how an adversary violates the law. Finally it justifies actions when China violates the law.[337] Much of Chinese legal warfare involves the attempt to demonstrate effective control. One attempt at demonstrating effective control is the creation of an East China Sea Air Defense Identification Zone (ADIZ). In this case, China's assertion of management of the air space over the Senkaku Islands is supported by a precedent seen in the *Nicaragua v. Honduras* case. In that case, the court ruled that Honduras's control over national air space was a demonstration of effective control.[338] More importantly, the ADIZ prevents Japan from claiming it maintains undisputed sovereignty over the Senkaku Islands. Here, legal warfare attempts to force Japan to acknowledge a dispute exists. Some of China's use of legal warfare is, in contrast, backed up by the Sino-centric historic waters legal argument. For example, China maintains that maritime patrols off the coast of disputed islands are legitimate demonstrations of Chinese sovereignty over its "historic waters." However, as case law repeatedly shows, maritime patrols do nothing to demonstrate effective control of territory. Therefore, China's use of legal warfare to demonstrate effective control attempts to defend or enhance its claim to sovereignty regardless if its actions will be interpreted as such in an international court. Instead, the state must demonstrate effective control on land. This

[337] Yanrong, "Legal Warfare: Military Legal Work's High Ground: An Interview with Chinese Politics and Law University Military Legal Research Center Special Researcher Xun Dandong," quoted in Cheng, "Winning Without Fighting," 2.

[338] *Nicaragua v. Honduras*, 49–67.

important legal element was particularly important in the case study analysis of the Senkaku Islands and Scarborough Shoal (as mentioned above).

Another example of legal warfare is China's marine reclamation. China is constructing artificial islands out of submerged reefs. Five low tide elevations in the Spratly Islands (Gaven Reef, Johnson South Reef, Cuateron Reef, Kennan Island, and Burgos Islands) are being converted into artificial islands.[339] Although reclamation of this nature is authorized within UNCLOS, UNCLOS only permits the construction of artificial islands within a state's 200 nautical mile EEZ. Therefore, China constructs these artificial islands on the disputed assumption that the Spratly Islands reside within China's EEZ.[340]

B. INTERNATIONAL RELATIONS FRAMEWORKS

To answer the second question, of which IR theory best explains China's behavior in its maritime disputes, this thesis needed to identify the relationship between IR theories and international law. Chapter I discussed this relationship by comparing offensive realism, defensive realism, the English School of Realism, and liberal institutionalism. Both offensive realism and defensive realism argue that power, not international law, is the most influential factor in international relations. The English School of Realism additionally identifies basic rules and norms, like international law, as creating a society of states. Liberal institutionalism concludes that institutions, like international law or UNCLOS, provide benefits for members and raise the costs of acting against international norms. Therefore, in the latter two views, states constrain their behavior in order to maintain their membership within the society of states (in the case of the English School) or these institutions (in the case of liberal institutionalism). By establishing these four IR frameworks and their relationship to international law, this thesis examined

[339] Murdoch, "Photos Reveal China Building on Reefs in Disputed Waters"; Hardy, James and Sean O'Connor, "China Builds another Island in South China Sea"; Tiezzi, "Why Is China Building Islands in the South China Sea?"

[340] Rupert Wingfield-Hayes, "China's Island Factory," *BBC News*, September 9, 2014, http://www.bbc.co.uk/news/special/2014/newsspec_8701/index.html; United Nations, "UNCLOS Maritime Zones," *UNCLOS Maritime Zones*, 1982, 43–44, http://www.un.org/depts/los/clcs_new/marinezones.jpg.

China's actions in its maritime disputes in order to identify an IR framework that most likely describes China's behavior.

In the three maritime disputes analyzed here, China exerts or attempts to exert effective control. Effective control is attempted either through *de facto* control over the island or through the use of legal warfare. By using effective control, China demonstrates a level of adherence to international laws. In some cases, by using legal warfare and a quasi-legal argument, China attempts to justify its actions under the guise of international law. This section will examine the IR frameworks of liberal institutionalism, offensive realism, defensive realism, and the English School of realism to categorize China's use of international law and legal warfare in its maritime disputes. The section will show offensive realism and the English School of Realism are two of the strongest IR frameworks that explain Chinese behavior related to its maritime disputes. In contrast, liberal institutionalism and defensive realism are two of the weakest IR frameworks to explain China's behavior.

1. Liberal Institutionalism

Of all four IR frameworks, liberal institutionalism is probably the weakest explanation of Chinese behavior related to its maritime disputes. Liberal institutionalism expects that prospective benefits deriving from institutionalized cooperation among states should lead China to constrain its behavior so it can continue to participate and profit from these organizations.[341] Some of China's behavior conforms to this expectation. For example, China ratified UNCLOS and constructs its arguments within the rubric of international law. China uses international legal norms to defend its maritime claims. For example, China uses a customary international law argument to defend its Nine Dash Line. Customary international law is an internationally recognized approach to settling legal disputes. Article 38 of the Statute of the International Court of Justice stipulates that the court will apply "international custom, as evidence of a general practice accepted as

[341] Justin S. Hempson-Jones, "The Evolution of China's Engagement with International Governmental Organizations: Toward a Liberal Foreign Policy?" *Asian Survey* 45, no. 5 (October 2005): 708–709.

law."[342] However, many western legal scholars agree, that China's use of a Sino-centric "historic waters" argument will probably not stand up in an international court of law. This is because, aside from the Paracel Islands, China failed to build a case that it historically exerted effective control over the claimed islands and rocks within the Nine Dash Line.[343] Furthermore, as the 2006 *Barbados v. Trinidad and Tobago* case clarified:

> Determining an international maritime boundary between two States on the basis of traditional fishing on the high seas by nationals of one of those States is altogether exceptional. Support for such a principle in customary and conventional international law is largely lacking.[344]

Therefore, based on legal scholars and legal precedents, China's Sino-centric historic waters argument, which rests on maritime activity, but not territorial control, will not likely stand up in court.

In January 2013, the Philippines submitted the dispute over the Scarborough Shoal and Spratly Islands to ITLOS. In its Notification and Statement of Claim, the Philippines's sought arbitration on China's claims in the South China Sea, including a ruling on the validity of the Nine Dash Line, construction of artificial islands within the Spratly Island archipelago, infringement of the Philippine's EEZ, and the denial of Philippine freedom of navigation within its EEZ. On 19 February 2013, China submitted a response to the Philippines's Notification and Statement of Claim stating China opposed the arbitration and declined to participate in its proceedings. China could justifiably argue the case exceeds the jurisdiction of the International Tribunal for the Law of the Sea (ITLOS) since the court must rule on the sovereignty of various maritime features in the South China Sea in order to render its verdict. Sovereignty determinations are outside the jurisdiction of ITLOS. Instead, the ICJ or PCA should hear the case to rule

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[342] United Nations, "Statute of the International Court of Justice" (United Nations, June 26, 1945), http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

[343] Erik Franckx and Marco Benatar, "Dots and Lines in the South China Sea: Insights from the Law of Map Evidence," *Asian Journal of International Law* 2 (2012): 100–110, doi:10.1017/S2044251311000117; Florian Dupuy and Pierre-Marie Dupuy, "A Legal Analysis of China's Historic Rights Claim in the South China Sea," *The American Journal of International Law* 107 (2013): 131–132; Masahiro Miyoshi, "China's 'U-Shaped Line' Claim in the South China Sea: Any Validity Under International Law?," *Ocean Development & International Law* 43, no. 2012 (2012): 4–6.

[344] *Barbados v. Trinidad and Tobago*, 83.

on sovereignty. With that said, in accordance with Article 298 of UNCLOS, states are not required to consent to compulsory jurisdiction for dispute settlement related to determining sovereignty over certain insular maritime features. China's position is that since the South China Sea case must rule on the sovereignty of maritime features, Article 298 is active and China does not have to participate. In lieu of compulsory jurisdiction Article 298 requires states to use diplomacy to settle the dispute. However from the Philippines's point of view, diplomacy has been exhausted and it has no other recourse except conflict or arbitration.[345]

China has more to gain and little to lose by opting out of the arbitration. If China participated in the South China Sea arbitration, it would set a precedent whereby legal action and not bilateral negotiation could become the standard for resolving sovereignty disputes with the PRC. China is a party to many sovereignty disputes (both land and maritime), so China has a lot to lose by participating in arbitration when many other states could prefer arbitration than confronting Chinese power in bilateral negotation. Additionally, China has little to gain from participating in the arbitration. In accordance with Annex VII, Article 9 of UNCLOS, a party's absence will not grant an automatic win to the disputing party. Article 9 stipulates the arbitrators will do their utmost to uphold a verdict based on fact and law. "Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law."[346] Therefore, China is counting on ITLOS to rule that the case is outside of its jurisdiction.[347] If China was willing to settle its maritime disputes in a court, then it could be argued liberal institutionalism provided the best explanation of China's behavior. China would accept the liberal institutions to maintain peace and stability within the international system. However, this is not the case. Although China

[345] Stefan Talmon and Jia, Bing Bing, eds., *The South China Sea Arbitration: A Chinese Perspective* (Portland, OR: Hart Publishing, 2014), 8–13, 107–135; People's Republic of China, "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines."

[346] United Nations, "UNCLOS," 189.

[347] Zhiguo Gao and Bing Bing Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications," *The American Journal of International Law* 107 (2013): 16–25.

willingly participates in arbitration in the World Trade Organization, it is unwilling to do the same in issues related to sovereignty.[348]

Another example of China operating outside the confines of liberal institutions is its violation of China's-ASEAN's 2002 Declaration on the Conduct of Parties in the South China Sea. As discussed in Chapter IV, the signatories of the Declaration on Conduct (which China signed in 2002) agreed not to "complicate or escalate" the disputes by inhabiting previously uninhabited maritime features.[349] Arguably, China's reclamation and conversion of submerged features into habitable artificial islands on Gaven Reef, Johnson South Reef, Cuateron Reef, Kennan Island, and Burgos Islands are evidence that China is not conforming to the China's-ASEAN's 2002 Declaration.[350] As a consensus based organization ASEAN did not place any punitive language or sanctions in its Declaration on the Conduct. However, the intent of the Declaration on the Conduct was to maintain a status quo and dissuade any escalation. China's recent construction efforts arguably upset the 2002 status quo.

Using observed Chinese behavior as evidence, China does not fully conform to liberal institutionalism in its maritime disputes. China is willing to operate outside some norms and institutions despite the incentives afforded by cooperation within international or multilateral institutions. Although China pays some heed to international law, it opts out of UNCLOS arbitral dispute settlement with the Philippines and dismisses provisions established in China's-ASEAN's 2002 Declaration.

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[348] World Trade Organization, "Member Information - China and the WTO," *World Trade Organization*, November 8, 2014, http://www.wto.org/english/thewto_e/countries_e/china_e.htm.

[349] ASEAN, "Declaration on the Conduct of Parties in the South China Sea" (ASEAN, November 4, 2002), http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea.

[350] Lindsay Murdoch, "Photos Reveal China Building on Reefs in Disputed Waters," *The Sydney Morning Herald*, September 15, 2014, http://www.smh.com.au/world/photos-reveal-china-building-on-reefs-in-disputed-waters-20140915-10h4r0.html; Hardy, James and Sean O'Connor, "China Builds Another Island in South China Sea," *IHS Jane's 360*, September 30, 2014, http://www.janes.com/article/43757/china-builds-another-island-in-south-china-sea; Shannon Tiezzi, "Why Is China Building Islands in the South China Sea?," *The Diplomat*, September 10, 2014, http://thediplomat.com/2014/09/why-is-china-building-islands-in-the-south-china-sea/.

2. Offensive Realism

Offensive realism provides the second strongest IR framework to explain China's behavior related to its maritime disputes. John Mearshimer proposes an offensive realist explanation of China's behavior in his book *The Tragedy of Great Power Politics*. Mearsheimer states that China's strategic calculus may not currently favor an exercise of power. China may desire to be a regional hegemon capable of instituting an East Asian version of the Monroe Doctrine. However, the timing and a corresponding reduction in U.S. power has not occurred to allow China to rise. Instead, China is building strength, waiting for the opportune time to exert its power. Due to the presence and strength of the United States, China does not maintain a clear power advantage to act as it wills within the region. Therefore, China's behavior may be explained by offensive realism, however the timing to exert that power has not come up.[351]

With respect to China's use of legal warfare, offensive realism does not entirely dismiss international law when it favors the state. If a state's actions are supported by a legal justification, the state will not disregard justifying its actions under law when it can deliver an advantage. Therefore, China's use of legal warfare, particularly the use of non-lethal force backed up by quasi-legal arguments, could be interpreted as incremental, small-scale, offensive realism. The use of maritime patrols and island reclamation are examples that suggest China uses a low level of hard power, backed up under the auspices of international law. In other words, China's quasi-legal arguments provide a legal pretense for China to act aggressively and cite international law while doing so. Additionally, as Brian Taylor Sumner raised, legal precedents in international courts emphasize the demonstration of effective control can lead to perverse incentives for states to conduct imperialistic land grabs.[352] It can be argued China's conversion of low tide elevations into man-made islands are imperialistic land grabs under the guise of international law. Therefore, this particular nuanced explanation using offensive realism

[351] John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: W.W. Norton and Company, Inc., 2014), 360–383.

[352] Sumner, "Territorial Disputes at the ICJ," 1810.

is one of the stronger IR explanations of China's behavior related to its maritime disputes.

Offensive realism, however does not explain fully China's behavior in its maritime disputes. Two pieces of evidence in particular fail to support offensive realist expectations. The first piece of evidence that China's behavior is contrary to offensive realism relates to its dispute with Vietnam. China maintains a clear power advantage over Vietnam, yet does not take advantage of it. The second situation that offensive realism cannot explain is the conversion of submerged features into artificial islands, or what is known as the "Island Factory". Why would a state expend resources in order to bolster a legal argument when power, not international law, is the preeminent force in geopolitics? Conversely, the evidence that China's behavior supports offensive realism is that China's strategic calculus does not endorse action because of the presence of the United States in the region. Similarly, China's use of legal warfare, if seen as a small scale land grab merely justified under the auspices of international law, would support offensive realism.

If China's behavior in its maritime disputes were based on an offensive realist calculus, China would use power in situations where it held a clear advantage. Currently, China has a power advantage over Vietnam. Vietnam possesses a weak military in contrast to China's military. In 2012 China expended between 1.99% and 4% of its GDP on defense. This equates to between $221 billion to $247 billion spent on the Chinese military.[353] In contrast, in 2012, Vietnam spent between 2.37% and 2.39% of its much smaller GDP on defense for a total between $3.3 billion and $8.08 billion on its own military. This means Vietnam spends between 1.3% and 3.7% of what China spends on its military.[354] Therefore, based on military spending alone, Vietnam's military is comparatively weak relative to China's military. Another area where China is more powerful than Vietnam is in economy. Vietnam is economically dependent on China

[353] James Hackett, ed., *The Military Balance 2014*, The Military Balance (London: Routledge for The International Institute for Strategic Studies, 2014), 230–240; Central Intelligence Agency, "World Fact Book - China," *World Fact Book*, 22 June 12014, https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html.

[354] Hackett, *The Military Balance 2014*, 287–289; Central Intelligence Agency, "World Fact Book - Vietnam," *World Fact Book*, 20 June 12014, https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html.

because of its trade deficit. In 2013, Vietnam's trade deficit with China was between $17.4 billion and $23.4 billion. This means China should dictate terms to a vulnerable Vietnam.[355]

In the relationship between Vietnam and China, China holds a clear power advantage. Therefore, in accordance with offensive realism, China's expected behavior related to its maritime disputes with Vietnam should resemble the 1974 Paracel Islands invasion. In that year, China successfully occupied the Paracel Islands. However, China does not behave that way toward Vietnam. Instead, China's behavior is rooted in low intensity conflict and legal warfare. When the Chinese oil exploration rig *HD-981* showed up in the waters off of Vietnam's coast, the oil rig was not escorted by a flotilla of naval combatants ready to sink approaching Vietnamese vessels. Instead, Chinese Coast Guard Vessels escorted the oil rig. Instead of using lethal force to confront Vietnamese Coast Guard Vessels, the Chinese Coast Guard used non-lethal force. With a 40 year history of conflict and war between both nations, intentional collisions at sea are preferable to the use of lethal force. With the power disparity between Vietnam and China, combined with the lack of a security agreement with the United States, offensive realists would expect to see more coercive behavior against Vietnam despite international condemnation. Yet this behavior is not observed.

The second example of China's behavior in its maritime disputes that offensive realism does not explain satisfactorily is the case of the Chinese "Island Factory."[356] Offensive realism pays little heed to the effects of international law on the international system. Powerful states do what they will regardless of international law. Yet, by creating man-made islands in the Spratly Chain, China attempts to solidify its legal claim to various submerged features by exerting effective control over the artificial island. China attempts to demonstrate effective control over submerged features by converting former shoals and reefs into man-made islands. An offensive realist would not expect such a

[355] Asia Briefing, "Vietnam Addresses Trade Deficit with China," *Asia Briefing*, August 6, 2013, http://www.asiabriefing.com/news/2013/08/vietnam-addresses-trade-deficit-with-china/; Xinhua, "China Remains Vietnam's Biggest Trade Partner in 2013," *China Daily*, January 29, 2014, http://www.chinadaily.com.cn/business/chinadata/2014-01/29/content_17264283.htm.

[356] Wingfield-Hayes, "China's Island Factory."

regionally militarily powerful state to go through this much trouble to bolster a legal claim.

In conclusion, the IR framework of offensive realism partially explains China's behavior in its maritime disputes. It can be argued China's behavior does not fall into offensive realism because it does not use power in the case against Vietnam, where it maintains a clear power advantage. China's construction of artificial islands to bolster a legal claim does not support offensive realism since realism identifies power and not international law as the primary factor influencing states. As a result, offensive realism is not an ideal framework to explain China's behavior in its maritime disputes. However, the nuanced argument that Chinese expansionist and power-maximizing behavior is disguised by legal warfare is a subtle but compelling argument that supports offensive realism.

3. Defensive Realism

Defensive realism is a weak and non-compelling IR framework to explain Chinese behavior related to its maritime disputes. In defensive realism, states pursue security, rather than power, in an anarchic world. To ensure security, states should act in moderation to prevent instigating security dilemmas and to prevent opponents from balancing against itself. Therefore the question must be asked, does China's behavior in its maritime disputes ensure security or jeopardize it? By examining the reactions of opposing claimants in the three maritime disputes, it is evident Chinese behavior creates distrust leading to security dilemmas and counterbalancing. Therefore, defensive realism does not fully explain Chinese behavior related to its maritime disputes. Although non-lethal, China's behavior over its maritime disputes pushes states to balance against it and inadvertently causes regional security dilemmas. This is evident in ASEAN's behavior, regional bandwagoning with the United States, and regional maritime security modernization.

a. ASEAN

In reaction to Chinese violations of China's-ASEAN's "Declaration on the Conduct of Parties in the South China Sea" and escalating tensions between China and

Vietnam, during the 2014 ASEAN meeting member states released a watered down joint statement to calm tensions in the South China Sea. Although the language of the joint statement was insipid, South East Asian scholar Carl Thayer noted that the unusual act of releasing a statement separate from the summary proceedings indicated unity among non-Chinese member states against Chinese escalatory behavior. "It highlights ASEAN unity on the fact that ongoing developments in the South China Sea are a source of serious concern because they have raised tensions."[357] The fact that member states made a separately released comment specifically addressing escalating tensions against one of its members is a subtle indicator of anti-China balancing in a consensus based organization like ASEAN. This is particularly relevant since two member nations specifically Cambodia and Myanmar are Chinese allies. [358]

b. Philippines

As China maintains its presence in the Scarborough Shoal, the Philippines drew closer to its ally, with the United States. During his visit to the Philippines in December 2013, Secretary of State John Kerry promised $40 million in maritime security assistance.[359] Later, in April of 2014, the Philippines and the United States agreed to the Enhanced Defense Cooperation Agreement. The agreement continued the existing military-to-military cooperation and training related to counterterrorism operations. More importantly, in reaction to escalating tensions in the South China Sea, the agreement promised to "assist the Philippine Coast Guard in assuming increased responsibility for enhancing information sharing and interagency coordination in maritime security

[357] Carl Thayer from Heijmans, "SCS Dispute Overshadows ASEAN Summit."

[358] ASEAN, "ASEAN Foreign Ministers' Statement on the Current Developments in the South China Sea" (ASEAN, May 10, 2014), http://www.asean.org/news/asean-statement-communiques/item/asean-foreign-ministers-statement-on-the-current-developments-in-the-south-china-sea; Philip Heijmans, "South China Sea Dispute Overshadows ASEAN Summit," *The Diplomat*, May 12, 2014, http://thediplomat.com/2014/05/south-china-sea-dispute-overshadows-asean-summit/.

[359] Keith Bradsher, "U.S. Forging Closer Military Ties with Philippines," *The New York Times*, December 17, 2013, http://www.nytimes.com/2013/12/18/world/asia/us-forging-closer-military-ties-with-philippines.html?_r=0.

operations."[360] Although the United States and the Philippines already maintain a security alliance, addressing deficiencies in the Philippine Coast Guard appears to be a direct reaction to Chinese Coast Guard operations in the Scarborough Shoal.

c. Vietnam

Vietnam looked past history and ideology and warmed to the United States as a way to balance against China. Bilateral relations have healed since initial rapprochement in 1995. By 2011, both states were comfortable enough to sign a Memorandum of Understanding for defense cooperation. The Memorandum promised high-ranking dialogue and cooperation in military operations, such as search-and-rescue and peacekeeping. As a way to counter the Chinese Coast Guard, in December 2013, Secretary of State John Kerry committed to bilateral assistance to augment the Vietnamese Coast Guard with five patrol boats and an additional $18 million in assistance. Additionally, Vietnamese Defense Minister Gen. Phùng Quang Thanh extended an open invitation for U.S. ships, including military vessels, to utilize Cam Ranh Bay for repairs. The United States has also offered the Trans-Pacific Partnership to Vietnam as a way to counterbalance the trade deficit Vietnam runs with China.[361]

Although Vietnam is far from achieving military parity with China, it has begun to modernize its navy around lethal anti-ship cruise missile vessels. In 2014 Vietnam received the first of six *Kilo* Class submarines from Russia. This variant of *Kilo* class submarine is capable of firing the SS-N-27 *Sizzler* anti-ship cruise missile. Along with the submarines, Vietnam has also purchased state of the art *Gepard* class frigates from

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[360] The White House Office of the Press Secretary, "Fact Sheet: United States-Philippines Bilateral Relations" (The White House, April 28, 2014), http://www.whitehouse.gov/the-press-office/2014/04/28/fact-sheet-united-states-philippines-bilateral-relations.

[361] Gregory B. Poling and Phuong Nguyen, "Kerry Visits Vietnam and the Philippines," *Center for Strategic and International Studies*, December 19, 2013, http://csis.org/publication/kerry-visits-vietnam-and-philippines; Department of Defense, "Joint Press Briefing with Secretary Panetta and Vietnamese Minister of Defense Gen. Phung Quang Thanh from Hanoi, Vietnam" (Department of Defense, June 4, 2012), http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5052; U.S. Embassy Vietnam, "U.S. - Vietnam Relations," *Embassy of the United States, Hanoi, Vietnam*, February 14, 2014, http://vietnam.usembassy.gov/usvnrelations.html; Erik Slavin, "Changing Times: Door May Open to U.S. Military at Former Vietnam War Hub," *Stars and Stripes*, June 18, 2014, http://www.stripes.com/news/changing-times-door-may-open-to-us-military-at-former-vietnam-war-hub-1.289509.

Russia and *Sigma* class corvettes from the Netherlands. The *Gepard* class frigate is capable of carrying the long range SS-N-25 *Switchblade* anti-ship cruise missile while the *Sigma* class corvette can fire the *Exocet* anti-ship cruise missile. Vietnam is also looking at upgrading its fleet of guided missile patrol boats with some of the most advanced Russian anti-ship cruise missiles, including the supersonic SS-N-22 *Sunburn* anti-ship cruise missile. A navy built around state-of-the-art, long-range, anti-ship cruise missiles ensures Vietnam is capable of waging a survivable *guerre de course* against Chinese shipping transiting through the South China Sea.[362] Vietnam's recently timed military modernization and bandwagoning with the United States is most likely a reaction to increasing insecurity pressures from China. If true, Chinese behavior in the South China Sea is specifically driving Vietnam's naval purchases and U.S. maritime security cooperation.

d. Japan

In the case of Japan, China's behavior using maritime patrols has created informal Japanese alliances with the Philippines and Vietnam. As discussed in Chapter IV, Japan is selling Vietnam and the Philippines coast guard vessels to aid in countering China's Coast Guard. Therefore, China's use of maritime law enforcement has caused a Coast Guard version of security competition. The informal alliance between Japan, Vietnam, and the Philippines provides evidence that territorial claimants are banding together to balance against China.[363]

One question that needs to be asked is why China's neighbors interpret Chinese behavior as expansionist. The answer can be found in international law. Recalling the precedent established in the *Legal Status of Eastern Greenland*, the bar for establishing effective control on remote islands is very low. PCA, PCIJ, and ICJ decisions reinforce

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[362] Defense Industry Daily, "Vietnam's Russian Restocking: Subs, Ships, Sukhois, and More," *Defense Industry Daily*, August 28, 2014, http://www.defenseindustrydaily.com/vietnam-reportedly-set-to-buy-russian-kilo-class-subs-05396/; Defense Industry Daily, "More than the Sum of Its Parts: Dutch SIGMA Ships for Vietnam," *Defense Industry Daily*, November 5, 2013, http://www.defenseindustrydaily.com/more-than-the-sum-of-its-parts-dutch-sigma-ships-for-vietnam-07173/.

[363] Xinhua, "Japan's Abe Plays With International Law in Thinly Veiled Move," *Xinhua*, May 30, 2014, http://english.sina.com/world/2014/0530/705178.html.

this standard. The geopolitical consequence of this legal standard leads states down a path toward miscalculating neighboring states' intensions. A single unprotested maritime patrol or an ADIZ is interpreted as a major threat to sovereignty leading to security dilemmas and balancing. For a defensive realist, maritime disputes are a nightmarish environment for misinterpretation and unintended escalation.

In reaction to perceived aggressive behavior, many of its neighbors are balancing against China by strengthening ties with the United States or with other maritime claimants. In the case of Vietnam and the Philippines, both countries leveraged the United States to aid in balancing against China. Additionally, both states are willing recipients of maritime security assistance receiving $18 million and $40 million respectively. This aid funds maritime security modernization programs in both countries. Additionally, regional security ties with Japan have grown in order to balance against China. Vietnam's military modernization also appears to be a reaction to perceived Chinese aggression in the South China Sea.

Defensive realism does not adequately describe China's behavior related to its maritime disputes, though it does explain the reactions of Vietnam, the Philippines and Japan. In the defensive realist framework, China should avoid actions to drive states to balance against itself. Additionally, it should steer clear of behavior to create security dilemmas. China's maritime neighbors clearly are attempting to balance against China. Chinese behavior is causing distrust. Although China can make a case that its behavior is a response to Japanese and Philippine maritime patrols, or Vietnamese outpost construction throughout the Spratly Islands, a perception gap clouds cognitive interpretations of which state initiates aggression and which state maintains the status quo.

This perception gap drives tensions related to the maritime disputes. Japan, Vietnam, and the Philippines perceive that China is the destabilizing expansionist force in East Asia. After all, China is a growing authoritarian power that has undergone an aggressive military modernization. It recently declared and enforced an ADIZ over the East China Sea. It frequently conducts maritime patrols and prevents Vietnamese and Philippine citizens from fishing or sailing in their own EEZ. China also constructs

artificial islands in the Spratly Archipelago. However, China argues all of its actions are a reaction to the destabilizing security environment surrounding itself. An ADIZ is a reaction to defend itself when it is surrounded by two American allies with well-established ADIZs. The maritime patrols are a defensive reaction to Vietnamese and Philippine maritime patrols that have arrested or endangered Chinese fishermen sailing in historic Chinese waters. China's construction of artificial islands is a reaction to Vietnamese and Philippine construction on islands in the Spratly Archipelago. From a Chinese perspective it is merely reacting to belligerent neighbors. In many cases, China was not the first to initiate the perceived conflict.[364]

4. English School of Realism

The English School of Realism is the strongest IR framework to explain China's behavior related to its maritime disputes while incorporating its use of legal warfare. English School scholar Hedley Bull argues that states observe three sets of rules that uphold the international order. The first set is the maintenance of a society of states, and establishes territorial sovereignty as the central principle for maintaining international order.[365] The second set establishes the rules of coexistence. This rule both restricts and legitimizes the use of violence between states, it establishes international law and diplomacy as means of settling disputes, and it limits the scope and aims of armed conflict.[366] In the context of its maritime disputes, China adheres to the rules of co-existence, as a state party to UNCLOS. China is a signatory to UNCLOS and adheres to most of its rules. For the most part, China does not violate the territorial waters of the Japanese home islands, the Koreas, or even Taiwan. China also respects the sovereignty of other claimants. For example, China has not acted to remove states from territory it claims. Although it claims the entirety of the territory within the Nine Dash Line, China has not violently removed states from islands within the Nine Dash Line since 1974.

[364] Zheng Wang, "The Perception Gap between China and Its Neighbors," *The Diplomat*, August 6, 2014, http://thediplomat.com/2014/08/the-perception-gap-between-china-and-its-neighbors/.

[365] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd ed (London: Macmillan, 1977), 65–66.

[366] Ibid., 65–67.

China also restrains its military behavior, despite being a regional military power. The third English School set of rules, cooperation rules, regulate the agreements and cooperation between states beyond mere coexistence, such as trade relations, environmental cooperation and human rights. For example, China is a member of the World Trade Organization. It enjoys the benefits of membership, and even participates in arbitration.

Among the coexistence rules within the English School of Realism, however, China appears to be attempting to reinterpret or revise the determination of sovereignty over maritime claims. Such reinterpretation of rules and norms is also explained by Bull. In an anarchical system, states are left to interpret the rules on their own. Bull argues states can take advantage of rules in a self-help system:

> States undertake the task of legitimizing the rules, in the sense of promoting the acceptance of them as valuable in their own right, by employing their powers of persuasion and propaganda to mobilize support for them in world politics as a whole.[367]

In many ways, legal warfare seems to parallel this English School idea. The English School explains states adjust and redefine the rules to their advantage by stating that, "states change the old rules by violating or ignoring them systematically enough to demonstrate that they have withdrawn their consent to them."[368] China argues that the Sino-centric historic waters argument is a valid argument based in customary international law. By repeatedly using this argument, China seeks to change the relevance of effective control over land as the determinative factor on how sovereignty is resolved. In lieu of effective control over land, China seeks to replace this norm with the principle that China was (and is) the pre-eminent power of East Asia and historic demonstrations of effective control over the water is sufficient validation of China's claim to the islands and waters of East Asia. Legal warfare is also one of the "three warfares," along with media warfare and psychological warfare. Therefore the application of the "three

[367] Ibid., 69.

[368] Ibid., 70.

warfares" seems to parallel Bull's idea of "employing their powers of persuasion and propaganda to mobilize support for them in world politics as a whole."[369]

Of all the IR frameworks, the English School of Realism appears to best explain China's behavior related to its maritime disputes. The English School accounts for China's behavior in accordance with international law and respect for sovereignty. It also explains China's variation from the norms established in UNCLOS and use of legal warfare as a way to change the manner in which sovereignty is determined.

C. CONCLUSION

The English School of Realism provides the most comprehensive explanation of China's behavior related to its maritime disputes. This IR theory addresses China's adherence to some international norms and laws, while it attempts to redefine other international norms, particularly with respect to determining sovereignty. China does not adhere to liberal institutionalism because it does not participate in international court resolution or arbitration and maintains a self-serving contradictory interpretation of UNCLOS. Offensive realism, as discussed above, is not the strongest framework for explaining Chinese behavior in its maritime disputes. First, although China maintains a clear power advantage over Vietnam, offensive realism suggests it should take advantage of Vietnamese weakness by taking Vietnamese-held islands throughout the South China Sea. However China has not done so, and shows no indication of doing so in the immediate future. Second, offensive realists believe power and not international law is the most influential factor in geopolitics. Yet, China expends a significant amount of resources to bolster a legal claim by constructing artificial islands in the South China Sea. However, a nuanced offensive realist explanation shows China's expansionist and power-seeking behavior can be disguised as status quo behavior that is justified under the auspices of international law through the use of legal warfare. Therefore, offensive realism does provide one possible explanation for Chinese behavior. Defensive realism is also not an adequate explanation of China's behavior in its maritime disputes. Instead of increasing its security, China's behavior triggers security dilemmas and counterbalancing

[369] Ibid., 69.

throughout the region. Japan, Vietnam, and the Philippines use the United States to balance against China. Vietnam most likely initiated a naval modernization as a response to China's overwhelming naval strength.

This thesis suggests two additional areas for further research. First, with respect to realist theories of international relations, more can be done to incorporate domestic factors and external perceptions into explaining China's behavior. Second, in order to evaluate the claims by those, such as Dean Cheng and Sangkuk Lee, who argue that Chinese scholars are active participants in legal warfare and media warfare, more research is needed. Research should investigate the disparity between scholarly articles written by Chinese scholars and western scholars.[370] Are Chinese scholars active participants in the "Three Warfares"? Anecdotally, when researching this thesis, it was apparent Chinese legal scholars overwhelmingly write to justify the legal case supporting the Nine Dash Line. Some of these articles are written on flimsy evidence and assumptions. The majority of western scholars, on the other hand, write in opposition to the Nine Dash Line. The answer would shed light on whether Chinese scholars are victims of groupthink that ultimately influences Chinese foreign policy, and what might be done to break down cognitive barriers to each side's arguments. In the end, more research can be done to prove or disprove this idea.

[370] Cheng, "Winning without Fighting," 6; Lee, "China's 'Three Warfares': Origins, Applications, and Organizations," 214.

LIST OF REFERENCES

Abeyratne, Ruwantissa. “In Search of Theoretical Justification for Air Defense Identification Zones.” *Journal of Transportation Security* 5, no. 1 (March 2012): 87–94.

ASEAN. “Declaration on the Conduct of Parties in the South China Sea.” ASEAN, November 4, 2002. http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea.

Asia Briefing. “Vietnam Addresses Trade Deficit with China.” Asia Briefing, August 6, 2013. http://www.asiabriefing.com/news/2013/08/vietnam-addresses-trade-deficit-with-china/.

Associated Press. “Filipino Fishermen Pay Price as China Ropes Off Disputed Scarborough Shoal.” *South China Morning Post*, May 23, 2013. http://www.scmp.com/news/asia/article/1243692/filipino-fishermen-pay-price-china-ropes-disputed-scarborough-shoal.

———. “Philippine Warship in Standoff with China Vessels.” *The Guardian*, April 10, 2010. http://www.theguardian.com/world/2012/apr/11/philippines-china-stand-off-south-china-sea.

Balouziyeh, John. “Russia’s Annexation of Crimea: An Analysis under the Principles of Jus Ad Bellum.” *LexisNexis Legal Newsroom - International Law*, April 14, 2014. http://www.lexisnexis.com/legalnewsroom/international-law/b/international-law-blog/archive/2014/04/14/russia-s-annexation-of-crimea-an-analysis-under-the-principles-of-jus-ad-bellum.aspx.

Barbados v. Trinidad and Tobago, 1, (Permanent Court of Arbitration 2006).

BBC. “China Says South China Sea Land Reclamation ‘Justified.’” BBC News, September 10, 2014. http://www.bbc.com/news/world-asia-china-29139125.

———. “Philippines ‘to Take South China Sea Row to Court.’” *BBC News Asia*, January 22, 2013. http://www.bbc.com/news/world-asia-21137144.

———. “Vietnam Accuses China in Seas Dispute.” BBC News Asia, May 30, 2011. http://www.bbc.com/news/world-asia-pacific-13592508.

Beckman, Robert. “The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea.” *The American Journal of International Law* 107, no. 142 (2013): 142–63.

Bentley, Scott. “Vietnam and China: A Dangerous Incident.” *The Diplomat*, February 12, 2014. http://thediplomat.com/2014/02/vietnam-and-china-a-dangerous-incident/.

Bloomberg News. “PetroVietnam CEO Says Chinese Ships Cut Cables ‘By Accident.’” Bloomberg News, December 4, 2014. http://www.bloomberg.com/news/2012-12-04/petrovietnam-ceo-says-chinese-ships-cut-cables-by-accident-1-.html.

———. “Vietnam Says Chinese Boat Harassed Survey Ship; China Disputes.” Bloomberg News, June 9, 2011. http://www.bloomberg.com/news/2011-06-05/china-reassures-its-neighbors-after-clashes-over-claims-in-south-china-sea.html.

Bristow, Michael. “China to Build School in Contested Paracel Islands.” BBC News Asia, June 15, 2014. http://www.bbc.com/news/world-asia-27856082.

British Empire, France, Italy, Greece, Romania, and Turkey. “Treaty of Lausanne,” July 24, 1923. http://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne.

British Empire, France, Italy, and Japan. “Treaty of Sèvres,” August 10, 1920. http://wwi.lib.byu.edu/index.php/Section_I,_Articles_1_-_260.

Brummitt, Chris. “Vietnam: Chinese Ships Ram Vessels near Oil Rig.” Associated Press, May 7, 2014. http://bigstory.ap.org/article/vietnamese-official-vietnamese-ships-collide-chinese-ones-close-rig-disputed-sea.

Bull, Hedley. *The Anarchical Society: A Study of Order in World Politics*. 2nd ed. London: Macmillan, 1977.

Burkina Faso v. Mali, 4, (International Court of Justice 1986).

Butcher, John G. “The International Court of Justice and the Territorial Dispute between Indonesia and Malaysia in the Sulawesi Sea.” *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 35, no. 2 (August 2013): 235–57.

Buzan, Barry. “China in International Society: Is ‘Peaceful Rise’ Possible?” *The Chinese Journal of International Politics* 3 (2010): 5–36.

Carter Center, The. *Approaches to Solving Territorial Conflicts: Sources, Situations, Scenarios, and Suggestions*. Atlanta, GA: The Carter Center, May 2010.

Carty, Anthony, and Fozia Nazir Lone. “Some New Haven International Law Reflections on China, India and Their Various Territorial Disputes.” *Asia Pacific Law Review* 19, no. 1 (2011): 93–111.

Chang, Amy. Indigenous Weapons Development in China’s Military Modernization. U.S.-China Economic and Security Review Commission Staff Research Project. U.S.-China Economic and Security Review Commission, April 5, 2012.

Charney, Jonathan. “Rocks That Cannot Sustain Human Habitation.” *The American Journal of International Law* 93, no. 4 (October 1999): 863–78.

Cheng, Dean. “Winning Without Fighting: Chinese Legal Warfare.” *The Heritage Foundation* 2692 (May 18, 2012).

China Daily. “Top 10 Trading Partners of the Chinese Mainland.” *China Daily*, February 19, 2014. http://www.chinadaily.com.cn/bizchina/2014-02/19/content_17290565.htm.

Chunying, Hua. “Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference on September 9, 2014.” Ministry of Foreign Affairs—PRC, September 9, 2014. http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1189470.shtml.

Clausewitz, Carl Von. *On War*. Princeton, NJ: Princeton University Press, 1976.

Cole, Bernard D. *The Great Wall at Sea: China’s Navy in the Twenty-First Century*. 2nd ed. Annapolis, MD: Naval Institute Press, 2010.

Cole, J. Michael. “China Deploying ‘Military Garrison’ to South China Sea.” *The Diplomat*, July 23, 2012. http://thediplomat.com/2012/07/more-prc-forces-into-south-china-sea/.

CPC Central Committee, and Central Military Commission. “People’s Liberation Army Political Work Regulations.” CPC Central Committee, December 5, 2003. http://cpc.people.com.cn/GB/64162/71380/102565/182142/10993467.html.

Cronin, Patrick M. “Muddy Waters.” *International Herald Tribune*. April 26, 2012.

Cruz De Castro, Renato. *China’s Realpolitik Approach in the South China Sea Dispute: The Case of the 2012 Scarborough Shoal Standoff. Managing Tensions in the South China Sea*. Washington, DC: Center for Strategic & International Studies, 2013. http://csis.org/files/attachments/130606_DeCastro_ConferencePaper.pdf.

Davis, Jonathan E. “From Ideology to Pragmatism: China’s Position on Humanitarian Intervention in the Post-Cold War Era.” *Vanderbilt Journal of Transnational Law* 44, no. 2 (March 2011): 217–83.

Denmark v. Norway, 4, (Permanent Court of International Justice 1933).

Department of Foreign Affairs (Philippines). “Philippine Position on Bajo de Masinloc (Scarborough Shoal) and the Waters within Its Vicinity.” *Department of Foreign Affairs (Philippines)*, April 18, 2012. http://www.gov.ph/2012/04/18/philippine-position-on-bajo-de-masinloc-and-the-waters-within-its-vicinity/.

Diola, Camille. “Closer Look at the Reclamation, Outpost on Mabini Reef.” *The Philippine Star*, May 16, 2014. http://www.philstar.com/headlines/2014/05/16/1323840/closer-look-reclamation-outpost-mabini-reef.

———. “Designs of China’s Planned Base on Mabini Reef Surface.” *The Philippine Star*, June 4, 2014. http://www.philstar.com/headlines/2014/06/04/1330967/designs-chinas-planned-base-mabini-reef-surface.

“Tian Jing Hao.” Dredgepoint.org, October 2, 2014. https://www.dredgepoint.org/dredging-database/equipment/tian-jing-hao.

Drifte, Reinhard. “The Senkaku/Diaoyu Islands Territorial Dispute Between Japan and China: Between the Materialization of the ‘China Threat’ and Japan ‘Reversing the Outcome of World War II’?” *UNISCI Discussion Papers* 32 (May 2013): 9–62.

Dunlap, Charles J. Jr. “Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts.” Working paper, Harvard University Kennedy School of Government, Carr Center for Human Rights, Cambridge, MA, November 29, 2001.

———. “Lawfare: A Decisive Element of 21st Century Conflicts?” *Joint Forces Quarterly* 54, no. 3rd Quarter 2009 (2009): 34–39.

———. “Lawfare Today... and Tomorrow.” In International Law and the Changing Character of War, edited by Raul A. “Pete” Pedrozo and Daria P. Wollschlaeger, (315–25). Newport, RI: U.S. Naval War College International Law Studies, 2011.

Dupuy, Florian, and Pierre-Marie Dupuy. “A Legal Analysis of China’s Historic Rights Claim in the South China Sea.” *The American Journal of International Law* 107 (2013): 124–41.

El Salvador v. Honduras, 4, (International Court of Justice 1992).

El Salvador v. Honduras (Summary), 1, (International Court of Justice 1992).

Elsea, Jennifer. *Treatment of ‘Battlefield Detainees’ in the War on Terrorism*. Washington, DC: Congressional Research Service, 2005.

Eritrea v. Yemen, 1, (Permanent Court of Arbitration 1998).

France v. United Kingdom, 4, (International Court of Justice 1953).

France v. United Kingdom (Summary), 1, (International Court of Justice 1953).

Franckx, Erik, and Marco Benatar. “Dots and Lines in the South China Sea: Insights from the Law of Map Evidence.” *Asian Journal of International Law* 2 (2012): 89–118. doi:10.1017/S2044251311000117.

Fravel, M. Taylor. “Much Ado about the Sansha Garrison.” August 23, 2012. http://taylorfravel.com/2012/08/much-ado-about-the-sansha-garrison/.

Friedberg, Aaron. “The Future of U.S.-China Relations: Is Conflict Inevitable?” *International Security* 30, no. 2 (Fall 2005): 7–45.

Gao, Zhiguo, and Bing Bing Jia. “The Nine-Dash Line in the South China Sea: History, Status, and Implications.” *The American Journal of International Law* 107 (2013): 98–124.

Glaser, Bonnie S. “China’s Coercive Economic Diplomacy.” *The Diplomat*, July 25, 2012. http://thediplomat.com/2012/07/chinas-coercive-economic-diplomacy/.

Guinto, Joel. “China Building Dubai-Style Fake Islands in South China Sea.” Bloomberg News, June 10, 2014. http://www.bloomberg.com/news/2014-06-10/china-using-dubai-style-fake-islands-to-reshape-south-china-sea.html.

Haiwen, Zhang. “Indisputable Sovereignty: Opposition to China’s Ocean Claim Is Poorly Supported.” *Beijing Review*, June 7, 2011. http://www.bjreview.com.cn/Cover_Stories_Series_2011/2011-06/07/content_380993.htm.

Halper, Stefan. “China: The Three Warfares.” University of Cambridge, May 2013. http://images.smh.com.au/file/2014/04/11/5343124/China_%2520The%2520three%2520warfares.pdf?rand=1397212645609.

Hardy, James, and Sean O’Connor. “China Builds Another Island in South China Sea.” IHS Jane’s 360, September 30, 2014. http://www.janes.com/article/43757/china-builds-another-island-in-south-china-sea.

Hardy, James, London Rahmat, and Ridzwan Rahmat. “Chinese, Vietnamese Coast Guards Square Off as Oil Rig Dispute Escalates.” IHS Jane’s 360, May 7, 2014. http://www.janes.com/article/37579/chinese-vietnamese-coastguards-square-off-as-oil-rig-dispute-escalates.

Heginbotham, Eric. “China’s ADIZ in the East China Sea.” *Lawfare: Hard National Security Choices* [blog], August 24, 2014. http://www.lawfareblog.com/2014/08/the-foreign-policy-essay-chinas-adiz-in-the-east-china-sea/.

Hempson-Jones, Justin S. “The Evolution of China’s Engagement with International Governmental Organizations: Toward a Liberal Foreign Policy?” *Asian Survey* 45, no. 5 (October 2005): 702–21.

Hiep, Le Hong. “Vietnam’s Domestic-Foreign Policy Nexus: Doi Moi, Foreign Policy Reform, and Sino-Vietnamese Normalization.” *Asian Politics and Policy* 5, no. 3 (2013): 387–406.

Himmelman, Jeff. “A Game of Shark and Minnow.” *The New York Times Magazine*, October 27, 2013. http://www.nytimes.com/newsgraphics/2013/10/27/south-china-sea/.

Holton, Richard H., and Xia Yuan Lin. “China and the World Trade Organization: Can the Assimilation Problems Be Overcome?” *Asian Survey* 38, no. 8 (August 1998): 745–62.

Hunt, Luke. “China’s Un-Neighborly Fishing Ban.” *The Diplomat*, May 19, 2012. http://thediplomat.com/2012/05/chinas-un-neighborly-fishing-ban/.

Hyde, Charles Cheney. “The Case Concerning the Legal Status of Eastern Greenland.” *American Journal of International Law* 27, no. 4 (October 1933): 732–38.

Ikeda, Tadashi. “Getting Senkaku History Right.” *The Diplomat*, November 26, 2013. http://thediplomat.com/2013/11/getting-senkaku-history-right/.

Indonesia v. Malaysia (Summary), 1, (International Court of Justice 2002).

Japan, and China. Treaty of Shimonoseki, 1895. http://china.usc.edu/(X(1)A(0L6_PDHqzwEkAAAAODAxOTZmODctMzQ3NC00NzU4LWIwMTktODg4MGExYWU5NmJmwtMoL-JpteZje1FppTPY3x8IhnQ1)S(uuvvws45x25sj1ilcewwij55))/ShowArticle.aspx?articleID=405&AspxAutoDetectCookieSupport=1.

Jennings, Robert Y. The Government of the State of Eritrea -and- The Government of the Republic of Yemen - Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty), 1, (Permanent Court of Arbitration 1998).

Johnson, D. H. N. “The Minquiers and Ecrehos Case.” *The International and Comparative Law Quarterly* 3, no. 2 (April 1954): 189–216.

Johnston, Alastair Iain. “Is China a Status Quo Power?” *International Security* 27, no. 4 (Spring 2003): 5–56.

Kane, Thomas M. *Chinese Grand Strategy and Maritime Power*. Portland, OR: Frank Cass, 2002.

Keck, Zachary. “China Imposes Restrictions on Air Space Over Senkaku Islands.” *The Diplomat*, November 23, 2013. http://thediplomat.com/2013/11/china-imposes-restrictions-on-air-space-over-senkaku-islands/.

———. “Japan Has Not Recognized Senkaku Island Dispute.” *The Diplomat*, November 11, 2014. http://thediplomat.com/2014/11/japan-has-not-recognized-senkaku-island-dispute/.

———. “With Air Defense Zone, China Is Waging Lawfare.” *The Diplomat*, November 30, 2013. http://thediplomat.com/2013/11/with-air-defense-zone-china-is-waging-lawfare/.

Kerry, John. “Statement on the East China Sea Air Defense Identification Zone.” Department of State, November 23, 2013. http://www.state.gov/secretary/remarks/2013/11/218013.htm.

Keyuan, Zou. “Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?” *IBRU Boundary and Security Bulletin* 7, no. 2 (1999): 71–81.

Kwiatkowska, Barbara. “The Eritrea-Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation.” *Ocean Development & International Law* 32 (2001): 1–25.

“Government Worried Over Lack of Effective Measures; Number of Days When Chinese Government Ships Intruded into Japanese Territorial Waters Exceeds 80.” Kyodo Clue IV. May 10, 2014. http://clue4.kyodonews.jp.

LaGrone, Sam, and Dave Majumdar. “Making Sense of China’s Move on Air Defense Zone.” *The Straits Times*. November 28, 2013. http://www.straitstimes.com/the-big-story/asia-report/senkakudiaoyu-islands/story/making-sense-chinas-move-air-defence-zone-2013.

Lee, Sangkuk. “China’s ‘Three Warfares’: Origins, Applications, and Organizations.” *Journal of Strategic Studies* 37, no. 2 (April 17, 2014): 198–221.

Lintao, Yu. “The Hot Zone - China’s Newly Announced Air Defense Identification Zone over the East China Sea Aims to Shore up National Security.” *Beijing Review* 57, no. 49 (December 5, 2013). http://www.bjreview.com.cn/print/txt/2013-12/02/content_580743.htm.

Malaysia v. Singapore, 6, (International Court of Justice 2008).

Malaysia v. Singapore (Summary), 1, (International Court of Justice 2008).

McCurry, Justin, and Tom Parfitt. “Russian Coastguards Kill Japanese Fisherman in Disputed Waters.” *The Guardian*, August 17, 2006. http://www.theguardian.com/world/2006/aug/17/russia.japan.

Mearsheimer, John J. “The Gathering Storm: China’s Challenge to U.S. Power in Asia.” *The Chinese Journal of International Politics* 3 (2010): 381–96.

Mearsheimer, John J. *The Tragedy of Great Power Politics*. New York: W.W. Norton and Company, Inc., 2014.

Miks, Jason. “China, Philippines in Standoff.” *The Diplomat*, April 11, 2012. http://thediplomat.com/2012/04/china-philippines-in-standoff/.

Mingjiang, Li. “Reconciling Assertiveness and Cooperation? China’s Changing Approach to the South China Sea Dispute.” *Security Challenges* 6, no. 2 (Winter 2010): 49–68.

Ministry of Defense - Japan. “China’s Activities Surrounding Japan’s Airspace.” Ministry of Defense - Japan. Accessed October 24, 2014. http://www.mod.go.jp/e/d_act/ryouku/index.html.

Ministry of Foreign Affairs (Japan). “The Basic View of the Ministry of Foreign Affairs on the Senkaku Islands.” Ministry of Foreign Affairs—Japan, May 8, 2013. http://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html.

Ministry of Foreign Affairs (Japan). “Japanese Territory - Northern Territories.” *Ministry of Foreign Affairs - Japan*, April 4, 2014. http://www.mofa.go.jp/region/europe/russia/territory/index.html.

———. “Japanese Territory—Senkaku Islands.” Ministry of Foreign Affairs—Japan, April 15, 2014. http://www.mofa.go.jp/region/asia-paci/senkaku/index.html.

———. “Japanese Territory - Takeshima.” *Ministry of Foreign Affairs - Japan*, April 11, 2014. http://www.mofa.go.jp/region/asia-paci/takeshima/index.html.

———. “Regarding Discussions toward Improving Japan-China Relations.” *Ministry of Foreign Affairs - Japan*, November 7, 2014. http://www.mofa.go.jp/a_o/c_m1/cn/page4e_000150.html.

———. “The Senkaku Islands: Seeking Maritime Peace Based on Rule of Law, Not Force or Coercion.” Ministry of Foreign Affairs - Japan. Accessed February 12, 2014. http://www.mofa.go.jp/files/000018519.pdf.

———. “Senkaku Island Q&A.” *Ministry of Foreign Affairs - Japan*, June 5, 2013. http://www.mofa.go.jp/region/asia-paci/senkaku/qa_1010.html.

———. “Statement by the Minister for Foreign Affairs on the Announcement on the ‘East China Sea Air Defense Identification Zone’ by the Ministry of National Defense of the People’s Republic of China.” Ministry of Foreign Affairs - Japan, November 24, 2013. http://www.mofa.go.jp/press/release/press4e_000098.html.

Ministry of Foreign Affairs (PRC). “China’s Initiation of the Five Principles of Peaceful Co-Existence.” Ministry of Foreign Affairs—PRC. Accessed September 1, 2014. http://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18053.shtml.

———. “The Issue of the South China Sea.” Ministry of Foreign Affairs (PRC), June 2000. https://www.fas.org/news/china/2000/china-000600.htm.

Ministry of Foreign Affairs (Vietnam). “The East Sea Issue under the Light of International Law.” *Vietnam’s Sovereign Boundaries*, August 22, 2011. http://123.30.50.199/sites/en/theeastseaissueunderthe-gid-eng1903a-nd-eng3b1b0.aspx.

———. “Evidence about Vietnam’s Sovereignty over Hoang Sa and Truong Sa Archipelagoes through the Nguyen Dynasty’s Officials Documents In The Early 19th Century.” Vietnam’s Sovereign Boundaries, October 24, 2013. http://123.30.50.199/sites/en/evidenceaboutvietnam-ssovereigntyoverhoang-gid-engbd569-nd-eng22fd7.aspx.

Miyoshi, Masahiro. “China’s ‘U-Shaped Line’ Claim in the South China Sea: Any Validity under International Law?” *Ocean Development & International Law* 43, no. 2012 (2012): 1–17.

Murdoch, Lindsay. “Photos Reveal China Building on Reefs in Disputed Waters.” *The Sydney Morning Herald*, September 15, 2014. http://www.smh.com.au/world/photos-reveal-china-building-on-reefs-in-disputed-waters-20140915-10h4r0.html.

Netherlands v. United States, 831, (Permanent Court of Arbitration 1928).

Nicaragua v. Colombia, 6, (International Court of Justice 2007).

Nicaragua v. Honduras, 6, (International Court of Justice 2007).

Nong, Hong. “Interpreting the U-Shape Line in the South China Sea.” *China US Focus*, May 15, 2012. http://www.chinausfocus.com/peace-security/interpreting-the-u-shape-line-in-the-south-china-sea/.

Nguyen, Phan Phuong. “Vietnam-China: Oil Search Heats Up Tension in South China Sea.” Inter Press Service, March 21, 1997. http://www.ipsnews.net/1997/03/vietnam-china-oil-search-heats-up-tension-in-south-china-sea/.

Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs. *Limits in the Seas China: Maritime Claims in the South China Sea*. Washington, DC: U.S. Department of State, December 5, 2014. http://www.state.gov/documents/organization/234936.pdf.

Office of the Secretary of Defense. "Annual Report to Congress: Military Power of the People's Republic of China 2009." Office of the Secretary of Defense, 2009.

Oude Elfernik, Alex G. "The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?" *Ocean Development & International Law* 32 (2001): 169–90.

Pan, Zhongqi. "Sino-Japanese Dispute over the Diaoyu/Senkaku Islands: The Pending Controversy from the Chinese Perspective." *Journal of Chinese Political Science* 12, no. 1 (2007): 71–92.

Pedrozo, Raul A. "Pete." *China versus Vietnam: An Analysis of the Competing Claims in the South China Sea*. CNA Occasional Paper. Arlington, VA: CNA Corporation Strategic Studies, August 18, 2014. http://www.cna.org/research/2014/china-versus-vietnam.

People's Republic of China. "Diaoyu Dao, an Inherent Territory of China." State Council Information Office, September 2012. http://news.xinhuanet.com/english/china/2012-09/25/c_131872152.htm.

———. "Declaration of the Government of the People's Republic of China on China's Territorial Sea." People's Republic of China, September 4, 1958.

———. "The Diversified Employment of China's Armed Forces (White Paper on China's Armed Forces)." Information Office of the State Council, April 16, 2013. http://news.xinhuanet.com/english/china/2013-04/16/c_132312681.htm.

———. "Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone," February 25, 1992.

———. "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines." People's Republic of China, December 7, 2014. http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

———. "White Paper: China's Peaceful Development." Information Office of the State Council, September 2011. http://english.gov.cn/official/2011-09/06/content_1941354.htm.

Perlez, Jane. "China Accuses Japan of Stealing After Purchase of Group of Disputed Islands." *The New York Times*, September 11, 2012. http://www.nytimes.com/2012/09/12/world/asia/china-accuses-japan-of-stealing-disputed-islands.html?_r=1&.

Permanent Mission of the People's Republic of China to the United Nations. Note Verbale. "Note Verbale (7 May 2009)." Note Verbale, May 7, 2009.

———. Note Verbale. "Note Verbale (14 April 2011)." Note Verbale, April 14, 2011.

Powers, Samantha. "Boltonism." *The New Yorker*, March 21, 2005.

Qatar v. Bahrain, 4, (International Court of Justice 2001).

Qatar v. Bahrain (Summary), 1, (International Court of Justice 2001).

Qingmin, Zhang. "Understanding Chinese Diplomacy since the 18th Party Congress." Waijiao Pinglun, March 5, 2014, 1–20.

Raine, Sarah, and Christian Le Miere. *Regional Disorder: The South China Sea Disputes*. New York: Routledge, 2013.

Ramos-Mrosovsky, Carlos. "International Law's Unhelpful Role in the Senkaku Islands." *University of Pennsylvania Journal of International Law* 29, no. 4 (2009): 903–46.

Rapp-Hooper, Mira. "The Battle for the Senkakus Moves to the Skies." *The Diplomat*, November 12, 2013. http://thediplomat.com/2013/11/the-battle-for-the-senkakus-moves-to-the-skies/.

Ratner, Ely. "A Plan to Counter Chinese Aggression." *The Wall Street Journal Asia*. June 11, 2014, sec. Business and Economics.

Reus-Smit, Christian. "The Politics of International Law." *In The Politics of International Law*, 14–44. Cambridge: Cambridge University Press, 2004.

Roosevelt, Franklin D., Chiang Kai-shek, and Winston Churchill. "Cairo Declaration," December 1, 1943. http://www.ndl.go.jp/constitution/e/shiryo/01/002_46/002_46tx.html.

Rosecrance, Richard. "Power and International Relations: The Rise of China and Its Effects." *International Studies Perspectives* 7 (2006): 31–35.

Rosen, Mark E. *Philippine Claims in the South China Sea: A Legal Analysis*. CNA Occasional Paper. Arlington, VA: CNA Corporation Strategic Studies, August 18, 2014. http://www.cna.org/research/2014/philippine-claims-south-china-sea.

Ryall, Julian. "Japan Agrees to Buy Disputed Senkaku Islands." *The Telegraph*, September 5, 2012. http://www.telegraph.co.uk/news/worldnews/asia/japan/9521793/Japan-agrees-to-buy-disputed-Senkaku-islands.html.

Shambaugh, David. “Coping with a Conflicted China.” *Washington Quarterly* Winter 2011 (Winter 2011): 7–27.

Shaw, Han-yi. *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims*. Baltimore, MD: School of Law University of Maryland, 1999.

Slomanson, William R. *Fundamental Perspectives on International Law*. 5th ed. Belmont, CA: Thomson Wadsworth, 2007.

Steinberg, Richard H., and Jonathan M. Zasloff. “Power and International Law.” *The American Journal of International Law* 100, no. 1 (January 2006): 64–87.

Stiles, Matt. “The Role for the U.S. in the East China Sea Dispute.” *National Public Radio*, January 13, 2013. http://www.npr.org/2013/01/30/170667524/reality-and-perception-on-the-containment-of-china.

Sumner, Brian Taylor. “Territorial Disputes at the International Court of Justice.” *Duke Law Journal* 53 (2004): 1779–1812.

Talmon, Stefan, and Jia, Bing Bing, eds. *The South China Sea Arbitration: A Chinese Perspectiv*e. Portland, OR: Hart Publishing, 2014.

Thuy, Tran Troung. “The Declaration on the Conduct of Parties in the South China Sea and Developing Maritime Energy Resources.” *National Bureau of Asian Research* 2011, no. 35 (2011): 2011.

Tiezzi, Shannon. “A China-Japan Breakthrough: A Primer on Their 4 Point Consensus.” *The Diplomat*, November 7, 2014. http://thediplomat.com/2014/11/a-china-japan-breakthrough-a-primer-on-their-4-point-consensus/.

———. “Why Is China Building Islands in the South China Sea?” *The Diplomat*, September 10, 2014. http://thediplomat.com/2014/09/why-is-china-building-islands-in-the-south-china-sea/.

Tzu, Sun. *The Art of War*. Translated by Samuel B. Griffith. New York: Oxford University Press, 1971.

United Nations. “UNCLOS Maritime Zones.” UNCLOS Maritime Zones, 1982. http://www.un.org/depts/los/clcs_new/marinezones.jpg.

———. “United Nations Convention on the Law of the Sea.” United Nations, December 10, 1982. http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm.

———. “UN Peacekeeping Troop and Police Contributors.” United Nations, June 2014. http://www.un.org/en/peacekeeping/resources/statistics/contributors.shtml.

———. “UN Research Guides and Resources: Security Council - Veto List.” Dag Hammarskjold Library. United Nations. Accessed September 1, 2014. http://www.un.org/depts/dhl/resguide/scact_veto_en.shtml.

United States, and Spain. “Treaty of Peace between the United States and Spain,” December 10, 1898. http://avalon.law.yale.edu/19th_century/sp1898.asp.

Voice of America. “China Defends Arrest of Vietnamese Fishermen Near Disputed Islands.” Voice of America, March 22, 2012. http://blogs.voanews.com/breaking-news/2012/03/22/china-defends-arrest-of-vietnamese-fishermen-near-disputed-islands/.

Vuving, Alexander L. “Strategy and Evolution of Vietnam’s China Policy: A Changing Mixture of Pathways.” *Asian Survey* 46, no. 6 (December 2006): 805–24.

Walton, Timothy A. “China’s Three Warfares.” Delex Consulting, Studies, and Analysis, January 18, 2012.

Wang, Tingting. “Coast Guard in Business for One Year, Cruises Diaoyu Islands 34 Times - At Least 10 New 1000-Ton Coast Guard Vessels Enter Service - Expelled Multiple Vietnamese Commercial Vessels Infringing on Our Drilling Platforms - Maritime Search and Rescue Success Rate Increases to 96.8 Percent.” Fazhi Wanbao Online, July 23, 2014.

Wang, Zheng. “The Nine-Dashed Line: ‘Engraved in Our Hearts.’” *The Diplomat*, August 25, 2014. http://thediplomat.com/2014/08/the-nine-dashed-line-engraved-in-our-hearts/.

———. “The Perception Gap between China and Its Neighbors.” *The Diplomat*, August 6, 2014. http://thediplomat.com/2014/08/the-perception-gap-between-china-and-its-neighbors/.

Welch, David A. “What’s an ADIZ? Why the United States, Japan, and China Get It Wrong.” *Foreign Affairs*, December 9, 2013. http://www.foreignaffairs.com/articles/140367/david-a-welch/whats-an-adiz.

Weller, Marc. “Analysis: Why Russia’s Crimea Move Fails Legal Test.” *BBC News Europe*, March 7, 2014. http://www.bbc.com/news/world-europe-26481423.

Wingfield-Hayes, Rupert. “China’s Island Factory.” BBC News, September 9, 2014. http://www.bbc.co.uk/news/special/2014/newsspec_8701/index.html.

Wood, Peter. “China’s ‘Eternal Prosperity’: Is Island Expansion a Precursor to South China Sea ADIZ?” *China Brief* 14, no. 20 (October 23, 2014): 3–5.

Wortzel, Larry M. *The Chinese People’s Liberation Army and Information Warfare*. Carlisle, PA: U.S. Army War College Press, 2014.

Xinhua. “China Approves Military Garrison for Disputed Islands.” *BBC News*, July 22, 2012. http://www.bbc.com/news/world-asia-china-18949941.———. “China Remains Vietnam’s Biggest Trade Partner in 2013.” *China Daily*, January 29, 2014. http://www.chinadaily.com.cn/business/chinadata/2014-01/29/content_17264283.htm.

———. “China Urges Japan to Correct Error.” *Xinhua*, September 11, 2014. http://news.xinhuanet.com/english/china/2014-09/11/c_133636482.htm.

———. “Fishing Ban Starts in South China Sea.” *Xinhua*, May 17, 2012. http://news.xinhuanet.com/english/china/2012-05/17/c_131592412.htm.

———. “Japan’s Abe Plays With International Law in Thinly Veiled Move.” *Xinhua*, May 30, 2014. http://english.sina.com/world/2014/0530/705178.html.

———. “Statement by the Government of the People’s Republic of China on Establishing the East China Sea Air Defense Identification Zone.” *Xinhua*, November 23, 2013. http://news.xinhuanet.com/english/china/2013-11/23/c_132911635.htm.

———. “Xi: There Is No Gene for Invasion in Our Blood.” *China Daily*, May 16, 2014. http://usa.chinadaily.com.cn/china/2014-05/16/content_17511170.htm.

Yanrong, Han. “Legal Warfare: Military Legal Work’s High Ground: An Interview with Chinese Politics and Law University Military Legal Research Center Special Researcher Xun Dandong.” *Legal Daily* (PRC), February 12, 2006.

Zong, Wenshen. *Legal Warfare: Discussion of 100 Examples and Solutions*. Beijing, PRC: PLA Publishing House, 2004.

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